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REPORTS
OF
Cases in Law and Equity,
DETERMINED IN THE
SUPREME COURT



BY GEORGE GREENE,
One of the Judges.

VOL. I.

DUBUQUE, IOWA.

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PREFACE.

It is hoped the present volume may prove acceptable to the legal profession and the public. Owing to an unavoidable press of other duties, the contemplated arrangement of the work has not been fully carried out.

If approved by the profession, arguments of counsel, in a condensed form, will generally accompany the cases in subsequent volumes. Members of the bar will greatly encourage this arrangement by submitting their points and references to the court in writing. It will be an especial object to preserve the work from everything like superfluity.

By arrangement of the court, a brief but sufficient statement of each case will be given in the opinion. This, it will be seen, has been done in most of the opinions reported in this volume.

A few cases decided in 1848, and not forwarded in time for this volume, will appear in the next.

DECEMBER, 1849.

JUDGE OF THE UNITED STATES DISTRICT COURT,
FOR IOWA,

HON. JOHN J. DYER.

UNITED STATES DISTRICT ATTORNEY,
STEPHEN WHICHER.

CLERK OF THE UNITED STATES DISTRICT COURT,
THOMAS S. PARVIN.



JUDGES OF THE DISTRICT COURTS OF THE
STATE OF IOWA.

FIRST DISTRICT,

HON. GEORGE W. WILLIAMS.

SECOND DISTRICT,

HON. JAMES GRANT.

THIRD DISTRICT,

HON. CYRUS OLNEY.

FOURTH DISTRICT,

HON. JAMES P. CARLETON.

FIFTH DISTRICT,

HON. WILLIAM M. KAY.

JUDGES OF THE SUPREME COURT,
WITHIN THE PERIOD COMPRISED IN THIS VOLUME.

HON. CHARLES MASON, Chief Justice,*

“ JOSEPH WILLIAMS, “ †

“ S. CLINTON HASTINGS, “ ‡

“ THOMAS S. WILSON, Judge, §

“ JOHN F. KINNEY, “ ||

“ GEORGE GREENE, “ ¶

CLERKS OF THE SUPREME COURT.

1st Dist. JAMES W. WOODS, Burlington,

2d “ ALEXANDER D. ANDERSON, Dubuque,

3d “ THOMAS J. GIVEN, Ottumwa,

4th “ GEORGE S. HAMPTON, Iowa City.

* Resigned in June, 1847.

† Appointed in June, 1847; term expired in January, 1848; and in December following elected by joint vote of General Assembly for six years, from 15th January, 1849.

‡ Appointed in January, 1848; term expired in January, 1849.

§ Resigned in October, 1847.

|| Appointed in June, 1847; and in December, 1848, elected by joint vote of the General Assembly for six years, from January 15, 1849.

¶ Appointed in October, 1847; and in December, 1848, elected by joint vote of the General Assembly for six years, from January 15, 1849.

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CASES
IN
Law and Equity,
DETERMINED IN THE
S U P R E M E C O U R T
OF
THE STATE OF IOWA ;

IOWA CITY, JANUARY TERM, A.D. 1847,

In the first year of the State.

PRESENT:

HON. CHARLES MASON, CHIEF JUSTICE.
HON. JOSEPH WILLIAMS, }
HON. THOMAS S. WILSON, } JUDGES

PRATT v. HUBBARD.

Under the statute of limitations, the defendant being without the state when the cause of action accrued, suit may be brought against him at any time within six years after he shall next come within the jurisdiction of the state.

ERROR, to Dubuque District Court.

THIS action was commenced by Pratt against Hubbard in assumpsit, on a promissory note. The defendant pleaded the statute of limitations; to which the plaintiff in his replication averred in substance, that he ought not to be barred from having and maintaining his cause of action, because, at the time when the cause of action accrued, the said Hubbard was

Pratt v. Hubbard.

out of the territory, and that within six years after he came into the territory this suit was commenced. The defendant rejoined, that the promissory note mentioned in the plaintiff's declaration was made and executed in the state of Connecticut, and at the date thereof and at the time the cause of action accrued, he was a resident of said state, and that he had never resided or been within this territory until the time mentioned in the plaintiff's replication. To this rejoinder the plaintiff demurred; but the court considered the facts set forth in the rejoinder sufficient in law to bring the case within the statute of limitations, and gave judgment accordingly for the defendant.

Thomas Rogers, for the plaintiff in error, contended that the district court erred in overruling his demurrer to the rejoinder; and in deciding that it should be governed by the statute of limitations of the territory of Iowa. See *Rev. Stat.* 386, § 8. *Ruggles v. Keeler*, 3 John. 263, Note (A.)

P. Smith, for the defendant in error. In the case of *Ruggles v. Keeler*, cited by plaintiff in error, the statute of limitations was not pleaded, consequently the question decided by the court was not properly in the case. But the greatest blunder of all is, that this decision is made upon the authority of the case of *Dupleix v. De Roven*, 2 Vern. 540, a case which Mr. Kent, in the first part of his opinion, says "arose a short time before the proviso in the statute of Anne;" and before he gets through with his opinion, he goes on to show that Lord Talbot, in that very case, was of opinion that the proviso extended to foreigners as well as to others; now we ask the court how Lord T. could have had an opinion with regard to a statute which was not then in existence? Courts have heretofore gone to extraordinary lengths, to explain away the statute of limitations, but the odium which once attached to this statute has now worn off; and it is properly construed like all other statutes of general utility. 1 Howard, Miss. 190; 3 Peter 278.

Pratt v. Hubbard.

In case of *Fisher v. Harnden*, 1 Pain, 55, Judge Livingston says, "the court here disclaims all right or inclination to put upon statutes of limitations which are among the most beneficial to be found in our books, any other construction than their *words* naturally import." Now we ask the court what is the "natural import" of the words "absence," and "return," both of which occur in the proviso in our statute. They cannot be applied to a stranger, who is moving here from abroad; either of those terms imply a previous residence, 3 Cowen and Hill's Notes to Phil. Ev. 903; 9 East, 192.

There are several decisions in Johnson's Reports, that one partner, after the dissolution of the partnership, can, by a new promise, revive a case barred by the statute of limitations.

But these decisions have all been overruled in the supreme court of the United States, and in numerous other courts: *Bell v. Morrison*, 1 Peters, 360; *Pike v. Greene*, 1 Yerger, 465; 3 Harrison, N. J., 265.

The replication is not good. It uses the word "come" instead of "return." He should show himself to be one of those persons described in the proviso.

Opinion by MASON, C. J. This was an action of assumpsit, to which the defendant pleaded the statute of limitations. The cause of action seems to have accrued more than six years prior to the commencement of the suit. But the pleadings show that at the time the cause of action accrued the defendant was a non-resident, and that his first coming into the territory was less than six years previous to the commencement of the suit. The question thereupon arises, whether, under such circumstances, the statute of limitations furnishes a valid defence.

The supreme court of New Jersey, in the case of *Taberer v. Brentnall*, 3 Harrison, 262, have decided that the statute of limitations may be pleaded in bar of an action on a promissory note given in England, where the plaintiff and defendant both resided, when the note came to maturity, notwithstanding

Pratt v. Hubbard.

the action may have been commenced within six years after the defendant came to that state. This case is relied upon by the defendant in error, as sufficient to sustain the decision of the court below.

But by referring to the New Jersey case, it will appear that the argument is founded mainly on the fact that the plaintiff, as well as the defendant, was a non-resident. They say that the exception in the statute does not operate in favor of a foreign creditor upon a contract made abroad, and not to be performed in that state.

Now, whatever the facts of the present case may be, the record does not show whether the plaintiff was or was not a non-resident. The case of *Taberer v. Brentnall* is not therefore in point.

But even if the cases were parallel, we should feel unwilling to adopt the rule of the New Jersey court. Our statute does not discriminate in favor of the domestic creditor. It declares broadly, that in *all* cases, where the defendant shall be out of the territory at the time the cause of action accrued, the suit may be brought at any time within six years after his return thereto. It would hardly be within the justifiable rules of judicial discretion, to declare that such a provision should not ensue to the benefit of a non-resident creditor.

It is true that the word "return," used by the statute in reference to the defendant, seems to authorise the inference that the legislature contemplated only cases wherein the defendant had at least once been within the territory; but that does not seem to have influenced the New Jersey decision. Nor should it have done so. The fair and just interpretation of the statute is that where the defendant is without the territory when the cause of action accrued, suit may be brought against him at any time within six years after he shall next come within our jurisdiction.

If it be said that this rule will work a hardship upon debtors, we reply that a remedy must be sought from a different source. Besides, it may be a serious question whether a con-

Harman v. Goodrich.

trary rule would not be attended with equal evils, by enabling the debtor to go from state to state, and thus elude the search of the creditor until the lapse of six years from the maturity of the debt.

In the conclusion to which we feel forced in this case, we find ourselves sustained by the supreme court of the state of New York. See *Ruggles v. Keeler*, 3 Johnson, 263, and note (A.) We therefore feel satisfied with establishing a rule different from that followed in the court below.

Judgment reversed.

HARMAN v. GOODRICH.

The statute, requiring a declaration to be filed in each case ten days before the second term of the court, applies alike to special and to general terms.

The filing of a declaration, as required by statute, is a rule of practice which the attorneys of the court are required to observe.

Though the plaintiff is non-suited, in an action of replevin, he may still offer testimony to prove ownership of property in himself, upon inquiry into the right of the defendant's possession; in order to show that the defendant could have sustained no substantial damage, as he was not the owner of the property.

The New York and English practice of moving to set aside the inquest for irregularity, is not applicable to the statute of Iowa, under which the inquiry of damages is made in open court, and not by the sheriff.

ERROR to Johnson District Court.

This was an action of replevin by *Peter D. Harman* against *William Goodrich*, to recover a span of horses and a wagon. At the October term of the district court, the cause was continued by consent of parties to a special term of said court, in January following; and then the defendant moved to dismiss the cause, and render judgment as in case of non suit, because the plaintiff had not filed a declaration ten days before the second term of the court, after the commencement of the suit; which motion was granted. And the defendant then applied for a jury to inquire into the right of possession to said pro-

Harman v. Goodrich.

perty, and assess the damages. After the defendant had closed his testimony in this inquiry, the plaintiff called up a witness and offered to prove that the right of property and right of possession were in him at the commencement of this suit. But this testimony was objected to, and the objection sustained by the court; who also decided that "the plaintiff could introduce no evidence in relation to the right or possession of the property, but merely as to the damages." Thereupon, the jury found for the defendant, and assessed the damages at \$35, 61.

C. Bates, for the plaintiff in error. The court erred in non-suiting said plaintiff, because no declaration was filed ten days before said special term. This cause was commenced within ten days before the October term, 1842; this is admitted by the defendant's motion in the district court, to have the plaintiff non-suited, because no declaration was filed ten days before said second term of the court.

The 16th section of "An act regulating the action of replevin," provides, that, "The proceedings in an action of replevin shall, as far as practicable, be subject to the same usages and rules of practice, as in ordinary personal actions, except as otherwise provided by law, or by the rules of court." (a) There being at the time said non-suit was granted, no rule of said district court, in any manner directing when the declaration should be filed in actions of replevin; the question would depend entirely upon the construction of the 6th sec. of "An act relating to practice in the district court" &c., approved Jan. 29, 1839. (b) By this section the plaintiff is bound to file his declaration ten days before the time at which the summons is returnable, if the suit be commenced that length of time before the term; but if not commenced ten days before the term, then the cause shall be continued; and if no declaration shall be filed ten days before the second term, the defendant shall be entitled to a judgment, as in case of non-suit. That the legislature intended by the "second term,"

(a) Rev. Stat., 537.

(b) Rev. Stat., 469.

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the second *general term*, there can be, it is believed, no doubt. When-ever the law speaks of "*a term*" of the court, it means a general term, unless a special term is particularly mentioned or-referred to. (a) The words "second term of the court," in this section, it is believed, were intended to mean the same as the words "next term of the court," in the 20th section of "An act allowing and regulating writs of attachment," approved Jan. 7th, 1839.

The continuation of this cause by order of the court, and by the consent of the parties to a special term to be holden previously to the second general term, could not be construed into a *rule*, requiring the plaintiff to declare ten days before such special term, when there was no law, or rule of court to that effect. Had the plaintiff been *legally non-suited*, at a general term; still, the district court erred, in rejecting the evidence offered by said plaintiff, to prove his right of property and right of possession to said chattel.

Our statute regulating the action of replevin, provides that, "If the plaintiff discontinue his suit, or become non-suited, or judgment be rendered against him on demurrer," &c., then the court, on application of defendant, shall empanel a jury to inquire into the *right of property* and the right of possession of said defendant to the goods, &c.

This trial is by the law to decide the whole merits of the case, in relation not only to the possession, but the title and right to the property itself. This law does not authorize the empanneling of a jury merely to assess the damages, upon the failure of the plaintiff to prosecute his suit, as in ordinary cases of non-suit; but requires the jury to try the very same facts that they would have been called upon to try, had a declaration been regularly filed, and the general issue pleaded thereto. See sections 17, 18, 19, 20, 21. I wish to call the attention of the court particularly to sections 20 and 21, and their connexion with the three preceding ones. Sec. 20 provides, that when the jury find for the plaintiff, on an issue found, or on *inquiry of damages*, they shall assess *adequate* damages to the

(a) *Wilkie v. Jones, Morris*, 97.

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plaintiff, for the illegal detention of the property, &c., and that judgment should be rendered therefor. Sec. 21 enacts, that in such case, if said property shall not have been replaced and delivered to the plaintiff, he shall in addition to the judgment for damages and costs, be entitled to a further judgment for the goods and chattels themselves. If the plaintiff, in case of a non-suit, cannot introduce any witnesses, or evidence, how can a court be advised of the plaintiff's *right of property or right of possession*, or upon inquiry for damages when the jury find for the plaintiff, of the amount of damages he ought to recover? It would be imposing too much of a hardship upon the defendant, to require of him, after being unable to establish his own right to the property or possession, to then go on and show what damage he had done to the plaintiff by the illegal detention of his property. If no witness can be called, except by the defendant, it would be difficult for the jury to ascertain what would be the *adequate* damages to the plaintiff for an illegal detention, inasmuch as the defendant would not be very apt to call witnesses, whose testimony would make against himself. That the statute in a case like this, contemplated the introduction of testimony by the plaintiff, it seems to me there can be no doubt; as the law certainly would not under any circumstances, when the TITLE to his property is to be tried, deprive him of the right to show his own title and right in the property. This action is governed entirely by the statute, and such construction should be given to it, as to protect, as far as possible, the rights and interests of each party. This cannot be done if the plaintiff is to be prohibited from introducing evidence, when the *right or possession* to property that he claims is to be adjudicated.

In actions of slander, libel, &c., if the defendant suffer judgment by default, still he may introduce evidence in mitigation of damages. Why not adopt the same rule when the plaintiff becomes non-suited, and it becomes necessary to inquire into the damages? Suppose in an action of replevin under our statute, that an officer should levy upon property that is exempt from execution, and the owner should replevy the property and then

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become non-suited, would the officer be entitled to the value of property, as his measure of damages, or should the defendant be permitted to introduce evidence to show that *the property was exempt*, and therefore, that the officer could be entitled to nothing more than nominal damages? Again, suppose the defendant hired the plaintiff's cattle for ten days, and at the expiration of that time refused to re-deliver them to the plaintiff, and thereupon he replevied them, and then became non-suited; should he not, on inquiry of damages, be permitted to show these facts in mitigation of damages?

The action of replevin is, *sui generis*, and must be governed by rules the best calculated to carry out the object of the law. The title of the property was in no manner settled by the non-suit, and the plaintiff, therefore, ought not to be precluded from introducing evidence to show title in himself. This would be but justice, and I know of no authority or law against it. See 2 Wheat., S., 1226, 1230, *note* (1.); 3 Wend. 196; and 3 Gill & Johnson, 247. This last case was a replevin bond, and the defendant, who suffered judgment by default, was permitted to introduce evidence to show that the plaintiff in the action of replevin, (said plaintiff in replevin having also become non-suited,) owned the property, in mitigation of damages. This is going farther than the district court was requested to go, by the plaintiff. But the rule established is the same asked for in the district court, though extended in its application to parties not connected with the original suit.

The manifest injustice that would necessarily follow the adoption of the decision of the district court, as a rule, or law of evidence, is a strong argument against it. Take this case—The plaintiff commenced his suit within ten days before the October term of the court, but did not file a declaration; supposing the law gave him until ten days of the next regular term to file it, but a special term was appointed to be holden before the second general term. and at the special term, the plaintiff was non-suited for want of a declaration being filed ten days before said term, and then a jury called to inquire of the

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damages, and also to *settle the right of the property claimed* by said plaintiff; and he not permitted to introduce a witness to prove that he had in fact, a good title to the property, to mitigate damages, or for any other purposes whatever; and the whole matter proceeded *exparte* to decide and settle the plaintiff's title. The defendant had no interest in the property whatever, except that of an officer holding it by virtue of an execution against a third person, and the possession, in the absence of any other evidence, would entitle him to a verdict, and the plaintiff rendered liable to pay as damages, the value of the property and something more for its detention, with costs; though he was really the *bona fide* owner of the property, and had his witness ready in court to prove that fact in mitigation of damages.

James P. Carlton, for the defendant. The plaintiff in error, in this case, seeks to reverse the judgment of the court below, on the ground that the court erred. 1. In non-suiting the plaintiff on the defendant's motion, he the said plaintiff having failed to file a declaration ten days before the commencement of the second term of the court, after the suit had been commenced. 2. In not permitting the plaintiff, upon a writ of inquiry, to introduce testimony to show the right of property, or right of possession, to be in said plaintiff.

As to the first, the defendant in error contends that there was no error, and, admitting for the argument, that the point is properly before the court, he relies upon the statute, page 469, § 6. By the record of the case, it will be discovered, that the plaintiff commenced his suit on the 20th day of September, 1842; that the writ was made returnable to the next term of the court, which commenced on the 5th Monday of October, 1842; that at that term of the court no declaration was filed; and that the case was continued by consent of parties, and the order of the court, until the January special term, 1843; that at that term there was still no declaration filed; and that thereupon the defendant moved the court to give judgment as in case of non-suit, in pursu-

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ance to the statute in such case made and provided. The plaintiff in error contends that the "second term" used in the statute means the second regular term, and refers the court to "Iowa Supreme Court R." of 1841, page 80. (a) This, however, the defendant thinks, cannot be the meaning of the statute, because special terms are just as much recognized by the law as general and regular terms. They are authorized by the statute, and when made, become just as much a term of the court as though they came on at the time prescribed by law. The special term was appointed for the hearing of this, as well as other causes; the parties were in court, and the cause continued, by consent and by order of the court, to that term. It was a term, therefore, at which disposition could be made of it; and so far as the case was concerned, it was to it a *second term*; and the plaintiff failing to comply with the requisites of the statute was therefore subject to its operation. The case cited by the plaintiff in error is not analogous. The statute under which that decision was made must be construed strictly: in this case it is not so construed. There the parties were not in court, here they were—there the parties had not by their own act and consent made the special term, a term to them—here they had. And further, the decision of the court in that case seems to go upon the ground, that the special term had not been established at the time the publication was ordered, implying thereby that if it had been, it would have been a second term, as to that case. Here the parties were in court, and agreed to the term; and therefore, if a term at all, it must have been a second term, because one term had already elapsed. The argument, drawn by the plaintiff in error, "*ab inconvenienti*," is not applicable here. What inconvenience could result, when the party was in court—knew all the proceedings of the court, and assented to the same? But again, is this point before the court? The precept, writ, and motion are no part of the record, unless made so by a bill of exceptions. 2 Blackf., 11; *ib.*, 402; 1 Scam. 233.

(a) *Wilkie v. Jones*, Morris, 97.

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This point should have been presented to the court by a bill of exceptions, in order to have made it a part of the record; and in the absence of that, the court cannot take notice of it. The court, without the writ, cannot tell how many terms have intervened from the commencement of the suit; and, in the absence of an error being *affirmatively* shown, the court always presumes that the court below acted correctly. *Hudson v. Matthews*, (Morris, 94.)

As to the second error, the defendant contends, in the first place, that this is not the proper court in which to correct errors in inquests. And to support this position the court is referred to *Morton v. Bailey*, 1 Scam., 213. The court there decided that the defendant, by suffering judgment by default, was out of court, and had no right to except to testimony; that he was permitted to cross-examine witnesses, but could not introduce witnesses, or make defence to the action. They say, further, that should improper testimony, or wrong instructions be given, the proper course is to apply to the court to set aside the inquest, and grant a new inquest. In that case, as in the one now before the court, the inquest was taken in open court. The same doctrine is held in 10 Petersdorff's R., 662 to 667 inclusive. The application must be made to the court to which the inquisition is returned, to set it aside. 3 Wendall, 478, to be found in Johnson's Digest, page 295, ¶ 13. In the case now before the court the plaintiff was non-suited, and was therefore out of court; and if any error was committed in the proceedings, the proper course was to apply to the court below to set aside the inquest. He stands in precisely the same situation in which the defendant would have stood, if judgment had been rendered against him by default. From the authorities above cited, if it be the subject of error, the record should show that an application had been made to the court to set it aside, together with the reasons upon which the application was based, and that the court refused so to do, which refusal should have been the ground of error. But the plaintiff in error relies upon the statute. By the old statute, which was then in force, page

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400, it was provided, that if the plaintiff discontinue his suit, or become non-suit, &c., the court, on application of the defendant or his attorney, shall empanel a jury to inquire into the right of property, and right of possession of the defendant, (not of the plaintiffs) to the goods and chattles in controversy. It is furthermore provided, that if the jury find that the defendant had the right of property, or was entitled to the possession of the same at the commencement of the suit, they shall assess damages for the defendant, as may be right and proper, together with costs of suit, for which judgment shall be rendered against plaintiff. Now there is nothing in either of these provisions which will authorize the plaintiff to come in and contest the right of possession by the introduction of testimony. He may, it is true, cross-examine the witnesses introduced upon the part of the defendant, as in case of default, and this was done; but to allow him to introduce testimony, would be to destroy the character of a non-suit. It would be the shadow without the substance. It would place him out of court; and yet give him all the rights he could possibly claim if he were in court. And for this the plaintiff in error contends; and refers, particularly, to the 20th section of the act regulating replevin, page 400. The court, in looking over that section, will at once discover, that this is intended to cover the case where the plaintiff obtains judgment by default against defendant. The first two sections, 17 and 18, refer to those cases alone where plaintiff is out of court; the 19th section, where issue is joined between the parties and verdict for defendant; and the 20th, where issue is joined between parties, and verdict for plaintiff; or where defendant is out of court, and a writ of inquiry ordered. It certainly can have no reference to the 17th and 18th sections, as contended for by plaintiff. The plaintiff, by the non-suit, admits that the defendant has sustained damages; but according to the argument of the plaintiff in error, he may come in and prove the right of property in himself, the same as though he were in court, and thereby defeat the defendant entirely. He

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loses nothing, then, by being non-suited. Certainly such doctrine is not correct.

But again, suppose that the plaintiff in error had a right to introduce testimony to show the right of property or right of possession in himself, in mitigation of damages; is there any thing in the bill of exceptions showing that the court below prevented him from so doing? The bill of exceptions does not state that this evidence was offered in mitigation of damages, nor does it show that the court prevented the introduction of testimony for that purpose. The court above, as before stated, will always presume that the court below did right, unless the contrary expressly appears. *Hudson v. Matthews*, (Morris, 94.) By the bill of exceptions it appears, that the court below decided that the plaintiff could introduce no testimony in relation to the right of property or right of possession, but merely as to damages. This clearly shows that the court decided that such testimony might be introduced as to damages, particularly when this court takes into the account that the witness was offered for the purpose of proving that the right of property or right of possession was in plaintiff in error generally, and not for any special purpose, not to mitigate damages. The court will notice particularly in the bill of exceptions, what the plaintiff in error sought to prove; the overruling that, is and must be the only ground of error. He offers the proof generally and not in mitigation of damages, and as it stands it might either go for that purpose or to defeat the defendant entirely. Can the court tell for what purpose it was offered, and if not, will the court say that the court below erred in rejecting it? The plaintiff in error must show error in the proceedings in the court below affirmatively. *Hudson v. Matthews*, above referred to. The court will infer nothing; if they do, it will be in favor of the court below. The plaintiff contends that it was only proper in mitigation of damages; and if so, it should appear that it was so offered, and when offered for that purpose was rejected. The authorities (particularly Gill and Johnson) referred to by plaintiff, show

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that the testimony was offered specially—that is, in mitigation of damages. The plaintiff in error states, in his bill of exceptions, that he offered to prove, by a certain witness, that the right of property and right of possession were in him at the commencement of the suit. He does not state for what purpose he offers the testimony. The court below decided that no testimony could be introduced in relation to the right of property and right of possession, but merely as to damages. This evidently means that the plaintiff offered it for one object, and the court decided it might be introduced for another, and for the very object for which the plaintiff in error now contends. That the court decided that testimony might be introduced as to damages, is clearly shown by the bill of exceptions; and if this court infers any thing from the language of the bill of exceptions, they must infer that the plaintiff by the testimony sought to go beyond a mitigation of damages, and that it was therefore properly rejected by the court. Exceptions not properly presented will not be regarded even in criminal cases. (15 Wend. 181, found in John. Dig., page 297, ¶ 77.)

Although the argument drawn from inconvenience is good in some instances, it is not good in this case. If any hardship grows out of the case to the plaintiff in error, it is the result of his own laches. Nor can imaginary cases operate upon the one before the court. It is not safe to decide principles of law by the supposition of extreme cases. The question is and should be, what is the law? That once ascertained, it must be maintained, however hard it may operate in particular cases.

Opinion by MASON, C. J. The first question presented for consideration in this case is, whether a special term of the district court is such a term as the statute contemplates when it declares that “if no declaration shall be filed ten days before the second term of the court, the defendant shall be entitled to judgment as in case of non-suit.” Why should it be said that this language refers to a general rather than to a special term? The latter is a *term* provided for by law as much as the former.

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When a case is continued, it is to the next legal term, whether general or special. The cases on the calendar are then to come up for trial, and declarations should be filed as directed by statute.

It is true that where a person enters into a recognisance to appear at the next term, and a special term is afterwards appointed, his recognisance will not be legally forfeited by his non-appearance at that special term. The recognisance is in the nature of a contract to be performed on a particular day. That day cannot be changed by one of the parties. But the filing of a declaration as required by the statute is merely a rule of practice which the attorneys of the court are required to understand and observe. In the present case, the argument against such a construction would be still farther weakened by the fact, that the cause was continued expressly to the special term. The ruling of the court below in this respect was clearly correct.

The plaintiff having been non-suited, a jury was empaneled in pursuance of the statute "to inquire into the right of property and right of possession of the defendant to the goods and chattels in controversy." Before that jury the plaintiff offered testimony to prove ownership of property in himself. This, on being objected to, was rejected by the court, and we are now to inquire whether this rejection was erroneous.

The case in 1 Scam. 213, seems to favor the position taken by the defendant in error; but that was an action of assumpsit, in which the defendant had made default, and a jury had been called to assess the damages. The court in that case decided that the defendant had no right to introduce witnesses.

But our statute seems to contemplate that after the plaintiff, in an action of replevin, has been non-suited, he may still show that the defendant has sustained no substantial damage, for the reason that he was not the owner of the property. It declares that in such cases a jury shall be empaneled to inquire into the right of property and right of possession of the defendant. That jury can certainly decide more understandingly after hearing testimony on both sides. And if the plaintiff in

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such cases is allowed to introduce any evidence at all, that which was proffered and rejected in this case was certainly material and proper. The case of *Belt v. Worthington*, 3 Gill and Johnson, 247, is in point, and sustains the position just taken.

But it is contended, that even if there was error in the ruling of the court below, the proper remedy was to move the court to set aside the inquest. Such is the course prescribed in New York and England, for the reason that there, an inquiry of damages in case of non-suit or default does not take place in open court, as with us, but before the sheriff, and a jury summoned by him for that purpose. If an error be committed by the sheriff, it is very proper that the court to which the inquest is returned should set the same aside and direct a new inquiry of damages. But it would seem at least unnecessary to apply to the district court to set aside an inquest, because that very court had committed an error. The courts in Illinois seem to have followed the New York rule, probably without reflecting that the reason of the rule had ceased.

The judgment below will be set aside, and a new trial awarded.

Judgment reversed.

EVANS AND WATKINS v. CORRIELL AND BROTHERS.

When a partnership is duly proved, the admission of one partner will bind the firm; but the admission of one partner is not sufficient to prove the existence of the co-partnership as against the other partner.

ERROR to Dubuque District Court.

Sanford and Smith, for the plaintiff, referred to the following authorities: 2 *Greenleaf's Ev.*, § 484; 14 *John.*, 215; 10 *ib.* 66; 1 *Howard, Miss.*, 527; 2 *Blackf.* 29; *Montagu on Part.* 97, and note.

Crawford and Rogers for the defendant in error.

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Opinion by MASON, C. J. Suit in this case was instituted against the defendant below, in their partnership, and not in their individual names. Judgment was rendered against them jointly. Evans alone was served with process, and the bill of exceptions shows that the only proof of their partnership was the admission of Evans.

Had the partnership been once duly proved, the admissions of either of the partners would have bound the firm. But such admissions by one partner are insufficient to prove the existence of the firm as against the other partner.

Judgment set aside, and a new trial ordered.

Judgment reversed.

STEWART, ADM., &C. v. NOBLE.

On 29th June, 1841, J. S. executed a title-bond to R. N., conditioned that he should forward a good title to certain lands on his arrival in Pennsylvania. J. S. died in August, 1841, without making the conveyance required by the bond. N. M. became administrator of the estate of J. S., *ex officio*, as public administrator, on the 16th Nov., 1842, and subsequently H. S. *et al* were substituted. N. M., as administrator, was sued on the covenants of the bond on 22d Nov., 1842. *Held*, that no action could be maintained against the administrator at the time suit was brought.

J. S. having died before breach of covenant in the bond, the proper course for R. N. was to file a bill under the statute for a specific performance.

As a measure of damages, in an action on a title-bond, it is proper to follow the value of the land described in the covenant, and that value to be determined by the consideration money and interest.

ERROR to Des Moines District Court.

J. C. Hall, for the plaintiff in error. 1. The court below erred in sustaining the demurrer to the pleas. They show that there was no breach before the death of Stewart. The question is, are the administrators liable for a breach that occurred after the death of Stewart? If so, what constitutes a breach of that covenant by the administrators? The only breach they could make would be to refuse a deed after the

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plaintiffs had applied to the district court, and obtained an order empowering them to convey under the statute then in force. Statute of 1839, 50, § 132; *ibid.* 455, § 44; Toller on Executors, 158, 163, 432; 4 *Bacon's Abt.*, 156—164; 2 Tomlin's Law Dic., 80.

2. As to rule of damages, see *Shepherd v. Hampton*, 6 Wheaton, 109; *Douglas v. McAlister*, 3 Cranch, 298; *Blydenburgh v. Welch*, 1 Bald. 331; *Gilpin v. Consequa*, Peters, C. C., 85; *Toyton v. Reed*, 4 Paige, 561; *West v. Beach*, 3 Cowen, 82; 4 Am. Com. Law, 77.

C. Walker, for the defendant. Neither of the pleas separately present a bar to the action. As to the plea of *non in-fregit*, it is bad to an affirmative covenant, and when the breach is specially alleged, as in this case.

The plea that he died before the covenants broken is bad, because the act of God does not discharge it. 4 Am. Com. Law, 30; 3 Burrow, 1637.

As to covenant sued on, plaintiff had his election to sue either administrator or heirs; the former, whether named or not, and the latter, because expressly named. 1 Toller on Executors, 458, 459, 462; 2 Wash., 155.

As to plea, that law in relation to administration of estates being part of contract, and that Noble was bound to apply to the court, and get an order to authorize the administrators and heirs to convey; it is not a plea of *puis darrein continuance* and bad; because happening after the action was brought, and is an attempt to obtain specific execution of a contract at law. And it is bad, because the law only gives Noble the privilege of making such application, and was a cumulative remedy, so that he had his election:

1st, To sue inequity for a specific execution.

2d, To apply to the court for an order to authorize the administrator to make him a deed.

3d, To sue on the covenant either the administrators, or heirs.

As to instructions, court below decided correctly, that the

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consideration money with interest was the measure of damages.

By analogy to covenants of seizen, of warranty, of good title, and other real covenants, when the measure is the same and the principle the same :—

1. That the decision of the supreme court of the United States was made by analogy to personal chattels, to which it is not to be likened, as chattels are more fluctuating in the market, and not the subject of specific execution.

2. The supreme court slid into the conclusion by analogy, and not upon examination of the stream of authority from the fountain.

3. The authorities of the state courts generally establish the doctrine, that the measure of damages is the consideration money and interest. *Blackwell v. Board of Justices of Lawrence County*; 2 Blackf., 147; *Staats v. Ten Eyck*, 3 Cain, 111; *Pitcher v. Livingston*, 4 John., 1; 4 *Dallas*, 436; 2 Bibb, 273; *Nelson v. Matthews*, 2 Hen. & Mun., 164; 2 Mass., 433; *Bickford v. Page*, *id.* 455

But the defendant was not in a posture, being out of court, to take exception to instructions. 1 Scam., 213; 1 Tidd's Prac., 521, 523.

As to the consideration expressed in the covenant being conclusive, see *Schermerhorn v. Vanderheyden*, 1 John., 139; *Maigley v. Hauer*, 7, *id.*, 341.

Opinion by WILSON, J. This was an action of covenant instituted by Richard Noble against the administrators of John Stewart, in the district court of Des Moines county, at the February term, 1843. The declaration sets out that John Stewart had, on the 29th of June, 1841, covenanted with Richard Noble by deed, &c. The bond is in the usual form, in the penal sum of three thousand dollars, concluding—"The conditions of the above obligations are such, that whereas Richard Noble has this day made a warranty deed of conveyance to a tract of land to the said John Stewart, valued at eighteen hundred dollars, and now if the said John Stewart shall, as

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soon as he may arrive at Fayette county, state of Pennsylvania, forward to the said Richard Noble, or his heirs, or his assigns, a good and complete warranty deed of conveyance to the northeast quarter of section number two, in township seventy-three, and the east half of the southeast quarter of section two, in township seventy-three, all north of range six, west, containing two hundred and sixteen acres, and forty-eight hundredths, (a reasonable time for said purpose being granted,) together with relinquishment of dower, then this obligation to be null and void, otherwise to be and remain in force."

"In testimony whereof, I have this 29th day of June, 1841, set my hand and seal.

JOHN STEWART." [L. s.]

Averment that Stewart did arrive in Fayette county, Pennsylvania, and that he had not kept his covenant, &c.

Norton Munger was the first administrator of Stewart, against whom suit was originally instituted. He suggested at the February term, 1845, that he was no longer administrator; that on the 28th of June, 1845, he resigned and was discharged from farther administering on the estate, and that the present plaintiff in error had been appointed administrator on the 15th of February, 1845, by the probate judge of Henry county, on letters regularly granted in Pennsylvania, &c.

On the motion of Munger to substitute the plaintiff in error, it was ordered by the court that the motion be overruled.

Munger, administrator, then pleaded; that the plaintiff, Noble, ought not farther to maintain his action against him as administrator of John Stewart, because he became administrator of said estate, by virtue of his office as public administrator of the county of Henry, on the 16th of November, 1842; that on the 27th of December, 1842, Hadassa Stewart, (widow of said John,) William Stewart, and Samuel Phillips, filed in the office of the probate judge of said county, letters of administration, granted to them in the county of Fayette, Penn., which said letters were duly recorded by the judge of probate,

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of Henry county. That on the 28th of January, 1845, and after the case was decided in the supreme court, and long after the time for which he was elected public administrator had expired, and long after he had ceased to act as public administrator; and the law creating said office had been repealed, he voluntarily appeared before the said probate court, to wit: on the 28th of June, 1845, and resigned; and that the said Hadassa Stewart, William Stewart, and Samuel Phillips were appointed administrators, &c., and that he was not bound by the law of the land farther to defend said suit.

A second special plea in abatement was filed, embracing the facts and statements in the first as a reason for not pleading to the plaintiff's declaration, concluding with a motion that the plaintiff be ruled to suggest upon the record the revocation of the letters to Munger, and the appointment of the plaintiff in error.

The plaintiff moved to strike these pleas from the file, which motion was overruled.

The defendant, Munger, also filed pleas in bar.

1. The general issue, *non est factum*.
2. That at the time of the commencement of this suit, said Stewart was dead, and that said plaintiff was only entitled to have a conveyance under the statute in such case provided.
3. That the plaintiff had never filed his bill for a specific performance, and that Stewart died without committing any breach, &c.
4. That no conveyance was made in accordance with the conditions of said bond before the decease of Stewart, and that after his decease, letters of administration were granted to Hadassa Stewart *et al.* which were recorded in Henry county, and that said administrators had on the 22d of July, 1848, filed in the district court of Henry county, a bill for specific performance of the contract of decedent, which was then pending, &c.

To which pleas the plaintiff filed a general demurrer, which was overruled, and the pleas sustained. And on motion, the plaintiffs in error were made parties defendant below, as

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administrators of John Stewart, deceased, vice Norton Munger, resigned.

The new defendants then *pleaded*.

1. *Non est factum*.

2. That decedent, in his lifetime, did not break the said supposed covenants.

3. *Actio non*, That before the time arrived for the performance of the supposed covenants, the said Stewart deceased.

4. That John Stewart, in his lifetime, did execute and deliver to said plaintiff said covenant; yet, before a reasonable time had elapsed after he returned to Pennsylvania, to make the deed in the covenant mentioned, the said Stewart died.

5. That the administrators had filed a petition for specific performance, and been authorized to execute the deed to plaintiff, Noble, and that the same was executed and tendered.

The plaintiff replied to the first, and demurred to the second, third, fourth, and fifth pleas, which demurrers were sustained. The third plea, on leave, was amended, which was again demurred to, and sustained. The plea of *non est factum* was withdrawn, and the cause submitted to a jury at December term, 1845, to assess the damages, which were assessed accordingly at \$2277,25; and judgment awarded.

On the trial the plaintiff offered in evidence the covenant set out in the declaration. No proof of the signature of John Stewart was given, but the counsel of plaintiff handed it to the defendant's counsel, saying, it was offered in evidence. The defendant's counsel handed it back, saying, "go on." No other evidence was given to the jury.

The court instructed the jury that the value of the land described in the covenant to be ascertained by the consideration money, and interest thereon, was the measure of damages, and that the bond read in evidence was conclusive that the consideration money was eighteen hundred dollars.

To reverse the judgment the defendants below have brought the cause here upon a writ of error.

1. It is considered by the court, that no action could be maintained against the administrator at the time suit was brought.

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Suit was brought 22d November, 1842. Munger appointed administrator, 16th November, 1842. Stewart died, August 27th, 1841. See Statute of 1839, "Wills and Testaments," section 93. The plea setting forth that objection was good.

2. Stuart died before breach, and a proper course for Noble was to file a bill, under the statute, for a specific performance.

3. The decision of the court below on the subject of the rule of damages is affirmed.

Judgment reversed.

CASES
IN
Law and Equity,
DETERMINED IN THE
S U P R E M E C O U R T
OF
THE STATE OF IOWA;

IOWA CITY, JULY TERM, A. D. 1847,

In the first year of the State.

PRESENT:

HON. JOSEPH WILLIAMS, CHIEF JUSTICE.
HON. THOMAS S. WILSON, }
HON. JOHN F. KINNEY, } JUDGES.

CARSON v. LUCORE.

To enable the plaintiff to recover the purchase money paid on a contract for land, after the defendant fails to make conveyance according to agreement, it is not necessary for him to tender a deed for the defendant to execute, unless expressly required to do so by the terms of the contract. *Query*: Is it necessary in such a case for the plaintiff, or his agent, to demand a deed of the defendant?

If the bill of exceptions does not fully set forth the evidence upon the point about which the court is requested to charge the jury, but still the facts involved tended to raise that point; and when the party for whom the verdict was given asked for the instruction, it will be presumed that the instruction was applicable, and had some influence with the jury.

ERROR, to Linn District Court.

Sanford and Smith, for the plaintiff. It appears by the bill of exceptions that Lucore had sold the land, so that he was unable to convey it to the plaintiff. This dispensed with

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the necessity of demanding a deed. *Blann v. Smith*, 4 Blackf. 517; Gil. Dig. 771.

The court erred in giving the jury instruction, that it was the duty of the plaintiff to tender a deed for defendant to execute. This we admit to be the English practice; but it has never been adopted in the United States. *Buckmaster v. Grundy*, 1 Scam., 314; 2 Randolph, 20; 2 McLean, 495; Gil. Dig., 134, 779.

The evidence on our part is not very fully stated in the bill of exceptions, but the court will presume that the instructions were applicable to the case, and had an influence on the jury; and if the instructions were erroneous, the judgment must be reversed. 11 Wheat., 59; *Peyton v. Bowell*, 1 Blackf., 244; *Rogers v. Lamb*, 8 Blackf., 156; *Senard v. Patterson*, *ib.*, 359.

S. C. Hastings and *I. M. Preston*, for the defendant. As to first point, we say, that it does not appear that Lucore had sold the land, and was unable to convey to plaintiff; on the contrary, it appears that the defendant is so able to convey, that plaintiff has filed a bill in chancery, now pending, to compel him to convey.

As to second point, we say the court did not instruct the jury as averred; but that one of defendant's attorneys suggested, that plaintiff should tender a deed for defendant to execute. But had the court so instructed, and admitting the instruction erroneous, the plaintiff can take no advantage of it here; as the bill of exceptions affirmatively shows that the contract, so far from being rescinded, was then in that court being enforced by plaintiff's bill for specific performance; and also, because the bill of exceptions shows that no demand even, was ever made by plaintiff of defendant for a deed, nor by his attorney as such. Julius E. Sanford demanded a deed, but exhibited no authority to make such demand, and named no person to whom such deed should be executed. The interrogatory to the witness was leading and illegal; and the witness did not give the reply or refusal of defendant to make a deed. The most favorable presumption, then, to plaintiff is, that the

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defendant was silent, as he should have been, at the impertinence of a stranger, in making such a demand.

If the bill of exceptions shows that the \$50 was paid to defendant for a certain tract of land; we answer, that it also shows that the contract has not been rescinded; and before an action of assumpsit can be sustained the contract must be rescinded.

The bill of exceptions shows that the \$50 were paid for a part consideration. That plaintiff had agreed to purchase a certain eighty acres of land, and deed half to defendant, in consideration of defendant's claim on the same; and, having failed so to do, plaintiff paid the \$50 in consideration and satisfaction thereof.

The bill of exceptions does not give all the evidence relative to the \$50; and such evidence as it does recite clearly shows that the plaintiff could not recover; and the case went to the jury under so much confusion and uncertainty of proof, that no instruction of the court could work a prejudice to the plaintiff.

An erroneous instruction of a judge, which works no prejudice to the party, forms no ground of reversal of the judgment. 2 U. S. Dig., 162; 3 Gill & John., 450.

Nor will a judgment be reversed on a writ of error, where it appears that the plaintiff sustained no injury from the error. 2 U. S. Dig., 162; 3 J. J. Marsh., 717.

An error must be a manifest one which will reverse a judgment; probability that the judgment is erroneous is not sufficient. 2 U. S. Dig., 164; 1 Halst., 132; 3 Littel, 14.

A bill of exceptions liable to the charge of ambiguity, uncertainty, or omission, ought, like any other pleading, to be construed most strongly against the party who prepared it. Gil. Dig., 96; 3 Scam., 6.

The bill of exceptions here belongs to plaintiff.

All the evidence should be embodied in the bill of exceptions. This bill refers only to certain evidence tending to show the facts. Gil. Dig., 93; 2 Scam., 507; *ib.* 355; *Lurton v. Carson*, 2 Blackf., 464.

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Opinion by WILLIAMS, C. J. William J. Carson sued Rufus H. Lucore in the district court of Linn county, in assumpsit, on an account filed for money had and received, &c. The plaintiff's declaration contained the common counts, alleging an indebtedness of \$150. Defendant pleaded non-assumpsit, and gave notice of set off. The cause was tried on the issue joined, and a verdict rendered by the jury, and judgment entered thereon in favor of the defendant, for the sum of fifty cents.

The plaintiff Carson sued out his writ of error to the judgment of the district court, upon which the cause is here upon errors assigned for adjudication.

The plaintiff in error assigns for error, in the proceedings of the court below, the following :

1. The court erred in instructing the jury, that before the plaintiff could maintain this action of assumpsit, for the recovery of money paid upon a contract to convey land, he or his agent, duly authorized, must first demand of defendant a deed.

2. The court erred in instructing the jury that said plaintiff could not maintain the action of assumpsit to recover money as stated in last assignment, unless he had first tendered a deed for defendant to execute.

The bill of exceptions shows that evidence was offered on the trial of the cause, tending to prove that the plaintiff, Carson, had let the defendant, Lucore, have fifty dollars, for which defendant was to convey to him a certain tract of land, the title of which was not then in the defendant ; and that the plaintiff knew that the title was, at that time, outstanding, and not in defendant. That the title afterwards had been made to the defendant Lucore. That a bill in chancery had been filed, and was at the time of the trial pending in the district court of Linn county, to compel Lucore, the defendant, to convey the land to Carson, the plaintiff. There was evidence of a demand of the deed by J. E. Sanford, as the attorney of Carson. And also, that on the part of the defendant, evidence was offered and given to the jury, tending to show that the fifty dollars here sued for was paid to Lucore by Carson, as the consideration upon which Carson should be released from a compliance

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with the terms of a contract, previously entered into, and made between him and Lucore; by which he had bound himself to enter certain land for the defendant in the land office, and which he had failed to do. This being the statement of facts as appears of record, the jury was instructed by the court, among other things, "that before the plaintiff could treat the contract referred to as cancelled, and sue in assumpsit for the said fifty dollars, he or his agent must first demand of the defendant a deed;" and farther, the court charged the jury, "that plaintiff should tender a deed for the defendant to execute."

To this instruction the counsel for the plaintiff excepted, all of which is certified to this court in due form of law.

This instruction of the district court is not in accordance with the law as now held by the courts in this country. It is true, that in England it has been sometimes held by the courts, that in a contract to convey land, it was necessary for the purchaser to prepare the deed of conveyance, in accordance with the terms of the contract, and tender it to the vendor, whether the contract provide that it shall be made by him at his cost and expense, or not. The practice there may be regulated by rules adopted by the profession, but it is a deviation from the principle of common law. By the common law, the party who binds himself by contract, to do a certain thing, which is itself not in violation of law, is required to do it, or cause it to be done, and to furnish the means necessary for its accomplishment, when the act required can be done without the co-operation of the other party, with whom the contract was made. This question has been examined and settled by the cases of *Buckmaster v. Grundy*, 1 Scam., 314; *Fairfax v. Lewis*, 2 Rand., 20, and 2 McLean, 495. The vendor binding himself by his contract to execute and deliver a deed conveying the title to land, is bound to procure and furnish the means to enable him to fulfil his part of the contract, and discharge himself from its obligations in accordance with its terms.

It has been suggested here by the counsel for the defendant in error, that this instruction of the court is not applicable to the case; that the facts in evidence, as set forth in the bill of

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exceptions, do not show to this court, that the instruction so given could have any influence on the minds of the jurors who tried the cause in the court below.

This instruction of the court, as appears by the bill of exceptions, was given at the instance and request of the attorney of the defendant, in whose favor the verdict was returned. Although the facts of the case as they were in evidence on the trial, and as contained in the bill of exceptions, may not fully and clearly show the entire applicability of the instruction, still we think there is enough presented by the case to justify this court in presuming that the instruction as given was applicable to the case, as presented to the jury upon the issue joined; and that it did affect the minds of the jurors in making up the verdict. The question of law which was to be settled by the court to govern the jury in making up the verdict from the facts proven, was, as to the necessity of a demand, and tender of a deed by the plaintiff, who stood as vendee in the contract, before he could recover in assumpsit for money paid. The facts apparent by the bill of exceptions, accompanied by the circumstance of the defendant's counsel asking for the instruction, furnish sufficient ground for this court to presume that it was applicable to the case. 11 Wheat., 59; *Peyton v. Howell*, 1 Blackf., 244; *Rogers v. Lamb*, 3 Blackf., 156; *Senard v. Patterson*, 3 *ibid.*, 359.

As this was the only error argued in this court, and as it disposes of the case, it is not necessary to notice any other.

Judgment reversed.

Cook v. United States.

COOK AND COOK v. UNITED STATES.

Upon an affidavit made in the district court, that the transcript from a justice of the peace is erroneous in setting forth the day upon which affidavit for an appeal was made, it is proper to rule the justice to file an amended transcript; and such amended transcript must be regarded as so much of the record in the case.

The affidavit for an appeal from a justice of the peace to the district court must be in the language prescribed by statute; hence it is not sufficient to swear that "injustice has been done by the verdict;" but the affidavit must state, that it has been done by the "verdict and judgment."

ERROR, to Henry District Court.

J. C. Hall, for the plaintiffs in error.

Alfred Lotspeich, prosecuting attorney for U. S.

Opinion by KINNEY, J. This was a prosecution under the statute, before a justice of the peace, for an assault and battery. Upon the trial before the justice the jury returned a verdict, assessing a fine against each defendant of thirty dollars. Whereupon the justice of the peace entered up a judgment against the said defendants for sixty dollars fine and costs of suit, taxed at eighty-one dollars and ninety-eight cents. As appears from the original transcript of the proceedings sent up to the district court of Henry county by the said justice, an application for an appeal was made on the day of trial, based upon the following affidavit, to wit:

"Wherein the United States are plaintiffs, and John Cook and Sarah Cook, defendants, we solemnly and truly and sincerely affirm that we believe that injustice has been done by the *verdict*, and that this appeal is not for the sake of time or delay, but that justice may be done.

Territory of Iowa, county of Henry, June 18, 1845.

JOHN COOK,
SARAH COOK."

Sworn to and subscribed before me, one of the justices of the peace for said county, Salem township.

DREURY OVERTON, J. P.

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The defendants having filed with the justice the bond according to the statute, and the case having been sent up to the district court, the prosecuting attorney suggested a diminution of the record supported by affidavits, showing that the affidavit for the appeal was not made on the day of trial, as purported by the transcript filed by the justice, and obtained a rule upon the justice to make out and file in the district court an amended transcript. In pursuance of said rule, the justice filed in the district court an amended return, in which he states as follows: "That the day on which judgment was rendered the defendants demanded an appeal and gave the security, which was accepted; and the appeal was granted, as I believed, and as the defendants believed; that owing to the fact that it was not known that it was necessary to file the affidavit, it was not then done. This was a mere mistake on my part, and as I believe, on the part of defendants, as I believe they could have filed the proper affidavit if either they or myself had believed it necessary to take and perfect the appeal. That as soon as it was ascertained that affidavit was necessary, and within ten days after the rendition of the judgment, the defendants appeared, and upon their representation and my own knowledge of the facts as stated above, I allowed them to file their affidavit, as of the day the judgment was rendered." Upon these facts appearing before the court, the prosecuting attorney filed a motion to dismiss the appeal, as the affidavit was not in accordance with the statute; which motion was granted by the court below, and the appeal dismissed at the defendants' costs. The case comes up to this court upon error, and it is assigned that the court erred in dismissing the appeal of defendants below.

The attorney for plaintiffs in error insists:—

1. That the record, as appears by the transcript, shows that the appeal was taken on the day the cause was tried. The affidavit and appeal bond were filed of that date.
2. The record has never been changed, but remains the same. The court below had no authority to rule the justice to give evidence as to the manner in which the record was made, and all such statements should be disregarded.

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3. The court below acted upon such statements, without an issue, and without giving the appellant an opportunity to dispute the truth of the statements thus made. The record, which the law stamps with indisputable verity, is disregarded, and the parole statements, which are the most unreliable evidence, are made the basis of the action of the court.

On the contrary, it is insisted for the defendants in error:—

1. That the amended return of the justice, made in pursuance of the order of the court, is a part of the record, and as such entitled to full credit.

2. That the affidavit not having been made upon the day of trial, the district court had no jurisdiction of the appeal.

3. That if the affidavit had been made upon the day of trial, as required by the statute, yet the court could not take cognizance of the case, as the statute required the defendants to swear that injustice had been done by the verdict and judgment; and the defendants only swear that injustice had been done by the verdict. *Rev. Stat.*, 353, § 15.

The questions that arise in this case are:—

1. Did the court err in ruling the justice to file an amended return upon the application of the prosecutor, based upon affidavits, that the original transcript was erroneous in relation to the day on which the affidavit for appeal was made? We think not. The original transcript, as filed by the justice, showed that the affidavit for appeal was made on the day of trial. The prosecuting attorney, in support of his motion for a rule upon the justice to amend his return, filed the affidavits of two individuals, which proved, conclusively, that the return of the justice was erroneous, and that the affidavit for appeal, instead of having been made upon the day of trial, as appeared in the transcript, was made some days subsequent, and dated back as of the day of trial. The statute expressly states, that "whenever the court is satisfied that the return of the justice is substantially erroneous or defective, the court may, by rule and attachment, compel him to amend the same." *Rev. Stat.*, 335, § 10.

The court thus having ample power under the statute, upon

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good cause shown to require the justice to amend his return ; so much, therefore, of said amended return as related to a particular fact that should have been entered upon the record, (and certainly so important a fact as the one in relation to the day on which the affidavit for appeal was made,) could very properly be regarded by the court as a part of the record in the case.

The fact then appearing before the court by the amended return of the justice, that the affidavit for appeal was *not* made on the day of trial, the next question is, did the court err in dismissing the appeal for the want of a proper affidavit. The statute expressly provides that "the plaintiff or defendant may appeal to the district court if he shall, on the day of the rendition of the judgment, file an affidavit, stating that he truly believes that injustice has been done by the verdict and judgment, and enter into bail, &c." *Rev. Stat.* 353, § 15. It is as absolutely necessary that the appellant should make his affidavit for appeal in cases of this kind upon the day of trial, as it is that he should perfect that appeal by entering into recognisance within the time prescribed by statute ; the way and manner for taking an appeal are clearly pointed out by statute, and the appellant must bring himself within the provisions of the statute or the case is not appealed or brought within the jurisdiction of the district court. But it is contended by counsel for plaintiffs in error, that if it was the intention of the party to appeal on the day of trial, and he made application for that purpose, but did not make his affidavit for some days subsequent, but within ten days, that the justice had a right to date and file the affidavit *nunc pro tunc*.

Justices of the peace, as officers of the statute, having no power except the power given them by statute, possess only special and limited jurisdiction, and their official acts to be valid must be in accordance with the provisions of the statute from which they derive their legal and official existence. If the justice of the peace has no authority under the statute to entertain an affidavit for appeal on a day, except the day of trial, then if the affidavit should be made upon any other day it would be void for the purposes intended, and of no effect.

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The next question presented for our consideration is, is the affidavit, even if it had been made upon the day of trial, in compliance with the statute? We think the affidavit is defective, and not such a one as is required by the statute. The statute states that a party may be entitled to appeal if he shall, "on the day of the rendition of the judgment, file an affidavit, stating that he truly believes that injustice has been done by the verdict and judgment." The affidavit filed in this case was, that injustice had been done by the verdict. The condition upon which the party is entitled to an appeal is, that he shall make the affidavit required by the statute. This is the incipient step to be taken; and as the statute has pointed out what the party appealing must recur to, as a basis upon which to predicate his appeal, there must be a compliance with the language of the statute, in this particular, to entitle him to his appeal. If the party does not make the affidavit required by statute, it would not be unreasonable to presume that he could not consistently do so. In this case it was the judgment upon the verdict that the party ought to have appealed from, if he appealed at all, and hence the necessity of the affidavit following the language of the statute, that injustice had been done by the "verdict and judgment." Therefore the court did not err in dismissing the appeal, and the judgment of the court below is affirmed.

Judgment affirmed.

Haggard v. Atlee.

HAGGARD v. ATLEE.

A usurious contract, under the statute of Iowa, is not void. Where the plea of usury is withdrawn, and the same question is raised on demurrer to the declaration, by consent of parties; the plaintiff in error cannot afterwards object to that method of disposing of the question.

ERROR, to Lee District Court.

J. W. Grimes, for the plaintiff in error, referred to 15 Petersdorff's Abt., 215; 3 Scam., 388; *Crawford v. Harvey*, 1 Blackf., 382.

J. C. Hall and *C. Walker*, for the defendant. Demurrer is a proper mode of defence. 1 Saund., 225. A contract made against law is void; and the note upon its face shows the illegal character of the transaction. 2 Peters., 538; 15 Mass. 35; 17 *id.*, 258; 1 Pick., 53.

Opinion by WILSON, J. This was an action of assumpsit, brought by Haggard, as assignee of Simmons, against Atlee, on the following promissory note, viz.: "Fort Madison, August 2, 1843. For value received, I promise to pay H. L. Simmons, or bearer, the sum of two hundred dollars, with twenty per cent. interest, until paid; this note to be paid six months from date. (Signed) J. R. ATLEE."

On the 5th of August, 1843, the note was assigned by Simmons to Haggard, by endorsement.

A general demurrer to the plaintiff's declaration was filed by the defendants, and sustained by the court. A writ of error was sued out to the judgment of the court, sustaining the demurrer.

The objection to the declaration aimed at by the demurrer, is, that the contract was for the payment of usurious interest, and is therefore void.

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The plaintiff in error contends, 1. That the court erred in deciding the contract to be void.

2. That this objection should have been presented to the court by the plea of usury, and not in a demurrer to the declaration. We will proceed to examine these questions, and ;

1. Was the contract void, because usurious interest was stipulated for ?

The statute regulating interest on money fixes the legal rate of interest at six per cent., and enacts : (a) "Sec. 4. No person shall, directly or indirectly, take or receive in money, goods, or things in action, or in any other manner, any greater sum or value, for the loan or forbearance of any money, goods, or things in action, than is in this act prescribed.

"Sec. 5. Every person who, for any such loan or forbearance, shall pay any greater sum or value than is in this act allowed to be received, he or his personal representatives may recover in an action against the person who shall have taken or received the same, or his personal representatives, the amount of money so paid, or value delivered, above the rate aforesaid, if such action be brought within one year after such payment or delivery.

"Sec. 6. Every person offending against the provisions of this act shall be compelled to answer on oath any bill that may be exhibited against him in chancery, for the discovery of any such sum of money, goods, or things in action, so taken, accepted, or received in violation of the provisions of this act, or any of them."

It will be perceived that the statute does not, as do the statutes of some of the states, declare a contract calling for usurious interest, void, but merely provides that more than six per cent, shall not be taken, and authorizes the person who has paid usurious interest, to recover from the receiver of it, the amount paid above the rate fixed by law. Nor does the statute of Iowa, like that of some other states, enact that no usurious contract shall be made. It merely says that no creditor shall,

(a) See *Rev. Stat.* 294. The second section authorizes parties to agree in writing for the payment of interest not exceeding ten per cent.

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on any contract, &c., take and receive above six per cent. interest, and prescribes as a sanction to the law, a liability on the part of the person receiving the interest, to the suit of the person paying it, for the recovery of the amount paid over and above the legal rate of interest. Did the statute declare usurious contracts void, the court would be compelled so to declare them, and to dismiss any suit brought to enforce them whenever the usuriousness was properly made to appear to the court. Farther, if the statute prohibited the *making* of any contract wherein more than the legal rate of interest was reserved, we would have some hesitation in deciding that the courts of the state would be compelled to enforce such a contract, because of its being in violation of a prohibitory statute, although high and paramount authority could be adduced as the basis of such adjudication. In the case of *De Wolf v. Johnson*, 10 Wheat. 392, we find a decision of the first question arising in this case. The *lex loci* where the contract in that case was made, after prohibiting the contracting for more than six per centum per annum interest, for the loan of money, &c., affixed as a penalty for taking more than the legal rate of interest, the loss of the interest, a penalty to the amount of the whole interest, and one third of the principal, if sued for within one year. One half of the forfeiture was to the state, and the other half for the use of the person who would prosecute for the same. In that case, it was contended that the court should refuse its aid to the enforcement of the contract, because the contract, although not avoided by law, was prohibited by it. In deciding this question, the supreme court of the United States, say: "that a court of equity will not lend its aid to an illegal or unconscionable bargain, is true. But the argument carries this principle rather too far as applied to this case. The law of Rhode Island certainly forbids the contract of loan for a greater interest than six per cent., and so far no court would lend its aid to recover such interest. But the law goes no farther; it does not forbid the contract of loan, nor preclude the recovery of the principal under any circumstances. The sanctions of that law are the loss of the interest, and a

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penalty to the amount of the whole interest, and one-third of the principal, if sued for within a year. On what principle could this court add another to the penalties declared by the law itself." No language can be more emphatic than this of the supreme court in the case just alluded to, and we adopt it as expressive of our views in the case before us. Were this court to decide that the contract in this case is void, it would be affixing a new penalty, not found in the law—it would be an act of legislation, when its power is only to declare what the law is. But this is a stronger case against this defendant, than that against the defendant in the case of *De Wolf v. Johnson*. In that case, the court declared that the contract should be enforced, although the making of it was prohibited by statute; whereas, in this case, the statute does not prohibit the making of the contract, but merely prohibits the *taking* or *receiving* of more than the legal rate of interest. We are not required either on the one hand to declare the whole contract void, because more than the legal rate of interest is reserved; nor on the contrary, to enforce it according to its terms, and give the plaintiff usurious interest; but it is our duty under the statute, to so enforce it as to give the plaintiff his money with the legal rate of interest, which course the statute does not forbid, and to withhold from him that which is illegal and forbidden.

This contract is not absolutely void; the making of it is not prohibited by statute, nor does its forfeiture accrue to the state or the public. In the latter, where the forfeiture is to the state or the public, it might be more plausibly contended that the contract would be void, than where the statute, as ours does, leaves the matter of forfeiture to rest with the person paying the usury. We have examined all of the authorities to which we had access, cited by counsel for the defendant in error, adduced to support the judgment of the court below, and cannot find in them, nor in others which we have had the opportunity to examine, any case denying or questioning the correctness of the decision of the supreme court of the United States, in the case of *De Wolf v. John-*

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son ; no case wherein it is decided that a contract reserving usurious interest is void, except where such contracts are declared void by statute.

The second point relied upon is, that the objection to the declaration should have been presented by the plea of usury, and not by a demurrer to the declaration.

The plaintiff in error cannot be permitted to urge this objection, because it appears from the record of the proceedings below, that by consent of parties, the defendant was permitted to withdraw his plea of usury, and to present the same question in a demurrer to the plaintiff's declaration.

The decision of the district court of Lee county, declaring the contract void, is set aside ; and the cause is remanded for farther proceedings not inconsistent with this decision.

Judgment reversed.

BURROWS v. GOODHUE.

The rule of practice which prohibits the attorney of a party in a case to act as commissioner in taking depositions under a *dedimus*, or to write down the testimony of a witness to be used on the trial of a cause, does not apply when the attorney is himself the witness, and reduces his own evidence to writing.

It is proper for a witness to write his own deposition, and swear to it before the commissioner duly authorized.

Statements made, not under oath, by a witness relative to the subject matter in controversy, may be admitted on the trial to discredit his testimony ; but if such contradictory statements are not supported by other proof, they must yield to his evidence given under oath upon the trial of the cause.

Where a lost promissory note, which was made payable to bearer, is the ground of an action in chancery ; to enable the complainant to recover, he must indemnify the defendant by bond and security against all claims on the note. Such indemnity may be required by decree of the court, and the complainant authorized to recover on compliance therewith, and on payment of costs.

Burrows v. Goodhue.

APPEAL IN CHANCERY, to *Scott District Court*.

E. Cook, for the appellant.

G. C. R. Mitchell, for the respondent.

Opinion by WILLIAMS, C. J. Charles T. H. Goodhue filed his bill of complaint against John M. D. Burrows, in the district court of Scott county. In which he sets forth, that the defendant Burrows, on the 20th day of September, A. D. 1841, made his promissory note in writing payable to one Tyrus H. Downer, or bearer, for the sum of three hundred dollars. That said note was payable one year after date. That the note was given to secure money in part payment of the price of a keel boat, purchased by the said Burrows from Downer. That about the first of January, 1842, and before the note became due, it was sold and transferred by Downer to Goodhue, the plaintiff, who thereby became the *bona fide* owner of the note, and entitled to the money therein called for, according to the terms thereof. That the money called for by said note, or any part thereof, had not been paid. That the appointed time for the payment of the money in accordance with the term of said note had elapsed, and therefore his right had accrued to demand the payment thereof. That he had requested the payment of the principal and interest due thereon of said Burrows, but that he had refused to pay it, alleging various pretences for so refusing. The bill farther alleges, that after the transfer of the said promissory note by the said Downer to Goodhue, the note was lost by some means, and that it could not be found after diligent search and inquiry. That the plaintiff, Goodhue, had offered, by bond and security, to indemnify the defendant, Burrows, against any claim or demand which might be made by any other person than himself on account of the note and money due thereon, if he would pay it to him, which was refused.

The bill then proceeds to pray, in the usual form, for such

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full and ample relief, in equity, by decree of the court, as, under the circumstances of the case, might be deemed just and proper.

The answer of the defendant, Burrows, admits most of the material averments contained in the bill, but questions the right of Goodhue to the promissory note, and the money due thereon. It also avers that the defendant has been, at all times, since the maturity of the note, and was, at the time of the making of the answer, ready and willing to pay the money properly due thereon, if he were fully indemnified and kept harmless against the note, as it could not be delivered up to him on payment.

Depositions of several witnesses were taken in accordance with the provisions of law, and produced on the trial. Among which was that of David Noggle, an attorney at law, into whose hands the note in question had been placed by Goodhue for collection before its loss; who proved the loss of the note, and the precise terms *in hæc verbæ* in which the note was drawn; together with the admissions of the defendant, Burrows, by which the consideration and justice of the indebtedness by virtue of the note were fully acknowledged. The ownership of the note, *bona fide*, is clearly established by the testimony of several witnesses to be in the plaintiff, Goodhue. The evidence also proved that Burrows, on several occasions, when requested to pay the money called for by the lost note, offered to discharge the indebtedness by paying it off in property; but the property was refused on account of the high price asked by him for it. The court below, upon trial, entered a decree for the plaintiff for the principal and interest due and the costs of the suit. From this judgment of the district court an appeal was taken by the respondent.

The counsel for the respondent, to reverse the decree of the district court, relies upon the following suggestions of error:—

1. The deposition of Noggle should have been rejected by the court, because it was written by himself, he being the attorney of Goodhue, the plaintiff in the action.

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2. The testimony of Noggle, the witness, as contained in his deposition, is not reconcilable with the statements made by him in his letters addressed to the respondent and his counsel, which, by consent, were adduced in evidence on the trial, touching matters material to the issue between the parties. It, therefore, ought to be rejected.

3. The plaintiff, before bringing his action on the lost note, it being payable to bearer, should have tendered to Burrows, the defendant, a good bond of indemnity, with sufficient security, to save him harmless against farther liability on account of the note.

As to the first point made by counsel for the defendant: it is true that the statute of Iowa has been so construed by the courts, as to prohibit the attorney of a party, when engaged as such in the case of his client, from acting as the commissioner, or scrivener, in writing down the testimony of a witness, taken by virtue of a *dedimus*. And, on the establishment of that fact, such testimony would be rejected on the trial. The propriety of this rule is apparent. A strict enforcement of it must tend to the preservation of the integrity and dignity of the bar, and prevent imposition upon the witness, and injustice to parties interested. The true principle here enjoined, is to assign the taking of the deposition to a commissioner, capable, honest, and entirely free from any interest whatever concerning the case. The writing of the testimony is a very material part of the taking of the deposition; and, in committing the evidence to the paper, the language of the witness should be strictly observed and adhered to by the commissioner, otherwise it will not be his testimony, when taken. We fully recognize the virtue of this rule. But what is the fact in this particular case? Noggle, the attorney of the plaintiff, into whose hands the note sued was put for collection, in an extraordinary manner, owing to the loss of the note, becomes the principal and most important witness in the case, for the plaintiff. Being cognizant of the facts necessary to enable the plaintiff to make manifest his right to recover the money due on the note from the defendant,

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he is called on as a witness, to testify before the commissioner, by virtue of the power vested in him by the *dedimus*. Having been summoned to testify, he appeared before the commissioner, and committed his own evidence in answer to the interrogatories propounded by the parties, in writing, in due form of law. All which has been properly certified by the commissioner, as appears by the return. This is, then, the case of the witness himself, writing his own testimony, in his own language, expressive of ideas, making up a statement of facts relative to the matter in controversy between the parties to the suit, all of which is verified by his oath. All responsibility, moral and legal, arising from the facts deposed, is thus fully and fairly thrown, where it ought to be, upon the witness himself. The rule here introduced to sustain the objection made by defendant's counsel, to this part of the proceeding in the case, certainly cannot with propriety be applied to the facts as they are shown to exist. The witness being capable, and before the person empowered by law to take the testimony, may write his own deposition. Indeed, by so doing, the whole, in form and substance, becomes most properly his own testimony. When called to testify in the case, Noggle was the witness, and not the attorney. He could not be the witness testifying, and the attorney writing out the testimony, at the same time.

The second point made by the defendant's counsel is based upon alleged contradictions in the statements made by Noggle, the witness. The statements which are thus held as contradictory are contained in his deposition, and presented to the court, in letters addressed by him when acting as the attorney of Goodhue, the plaintiff, to defendants, and made part of the evidence in the case. We have examined these letters, in connection with his deposition. It is true, that without being very explicit, as to the right of others than Goodhue to a portion of the money due upon the note, he speaks in those letters of the manner in which the proportions of, and to whom this money, when collected, was to be paid. But his letters do not show that the entire interest in, and ownership of the note, or

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any part thereof, was in any other than Goodhue; whilst in his deposition he clearly explains the whole transaction as between Goodhue and others, showing that he alone could properly bring the suit, and maintain it. Fencher in his deposition states, positively, that Goodhue is the sole owner of the note. His statements, made under oath, are also supported by the testimony of the other witnesses. However, as suggested by the defendant's counsel, the facts presented by the letters were irreconcilable with those contained in the deposition, in matter material to the issue between the parties; still, we could not, legitimately, and in accordance with the principles of evidence, disregard the evidence in the deposition. The letters do not contain the statements of the witness, made with the sanction of an oath, legally administered. The deposition is made up of statements taken under all the solemnities of moral and legal responsibility. Although statements made by a witness, when not under oath, may be admissible on trial, to impeach the testimony of a witness given on oath, about the same subject matter; still, in the absence of any other evidence, direct or circumstantial, to sustain such statements, they would be disregarded; and the testimony taken under legal provision, sanctioned by oath, must prevail in deciding the case. In this case, however, if the discrepancy contended for by defendant's counsel existed, the deposition of the witness is supported by other testimony; whilst the construction attempted to be put upon the letters is entirely explained away and destroyed. We think that the letters and the depositions are not materially contradictory, and if they were, as the case stands, the court would be governed in adjudicating this case by the facts stated under oath.

The third, and last point on which counsel for the defendant relies, we think does not preclude a recovery of the plaintiff here, in accordance with the principles of sound equity. It is true that he did not, until entering of the decree in the court below, tender, or deliver, to the defendant, Burrows, a good and sufficient bond, to indemnify him against future liability and loss, on account of the note falling into other hands.

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But as the record shows, that, in accordance with the terms of that decree, such a bond has been filed in the district court, we are of the opinion that the plaintiff is entitled to recover from the defendant the amount of the note, as proved and set forth in the bill of complaint filed in this case, together with interest thereon, at the rate of six per centum per annum; and that a decree in terms be entered therefor. It is farther the opinion of the court, that the plaintiff, Charles F. H. Goodhue, having failed to execute and deliver to the defendant a good and sufficient bond of indemnity, until the entering of the decree in the court below, shall pay the costs of this suit up to the time of the making and entering of the decree.

The decree of the court below is therefore affirmed at the costs of the plaintiff.

Decree affirmed.

DUNHAM v. COLLIER AND PETTIS.

Where there is a judgment, and also a decree against a party for the same demand, the collection of the money under the decree cannot be enjoined unless the complainant allege in his bill that the judgment has been satisfied.

APPEAL IN CHANCERY, from Louisa District Court.

This was a bill in chancery, by Dunham against the defendants, for an injunction to stay proceedings at law, on execution. The bill states the following facts. On the 30th day of August, 1844, execution issued against the complainant, for the sum of two hundred and eighty-eight dollars debt, and twenty dollars costs, and was directed to be levied upon particular lands therein described. The writ was issued to satisfy a supposed decree in favor of Collier and Pettis, when, as complainant avers, no sufficient decree had been rendered against him in their favor; as a mortgage decree had been previously adjudged in favor of Webber and Reney; and the

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right to it subsequently decreed to the said Collier and Pettis, when the bill to which they were parties had been previously dismissed. The complainant also states, that he was garnisheed for this demand, by Collier and Pettis, as creditors of Webber and Reney, and the judgment for the original demand on which the writ of execution issued, was rendered against him, and that this garnishee judgment was rendered in Des Moines county, previous to the decree made in Louisa county, which vested the right to the mortgage decree of Webber and Reney, in Collier and Pettis. The bill concludes with a prayer to enjoin farther proceedings by execution against the land affected by the mortgage decree, and for a perpetual injunction, if it should be found that said Collier and Pettis have a subsisting judgment of an older date for the same demand, in the district court of Des Moines county.

Upon this bill an injunction was allowed by WILLIAMS, J. in vacation. At the April term following, 1845, the defendants filed their motion to dismiss the bill, and dissolve the injunction, for the following reasons. 1. There is no equity in the bill. 2. There is a clear, adequate, and complete remedy at law. The motion was granted, and a decree rendered accordingly.

David Rorer and J. W. Woods, for the appellant.

Grimes and Starr, for the respondent.

WILSON, J. The fact that there was a judgment in Des Moines county against Dunham, as a garnishee, would not prevent Collier and Pettis from proceeding to collect the money, by a sale of the mortgaged premises, under the decree of foreclosure. Dunham cannot ask for an injunction against the collection of the money under the decree, unless he allege that he has satisfied the judgment in Des Moines county. (a) We see no equity in the bill, and think there was no error in the court below.

Decree affirmed.

(a) *Christie v. Bogardus*, 1 Barb. Ch. R. 167.

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COOK AND OTHERS v. UNITED STATES.

After a judgment is entered upon the verdict of a jury, it is not proper to entertain a motion to set aside the verdict, without first having the judgment opened.

A motion for a new trial, based upon facts, is addressed to the sound discretion of the court; but should always be allowed, if the verdict is contrary to law, or works manifest injustice to the party applying.

In applications for new trials, this court can only review and correct the discretion of the district court, when exercised upon questions of law, affirmatively shown by the record. It will be presumed that the court below acted properly, if the record does not disclose the points upon which the motion for a new trial was made.

Under the revised statute, where there is any latitude given as to the amount of the fine, or time of imprisonment, for any offence, it is the exclusive province of the jury to fix the amount of the fine, and of the judge to fix the time of imprisonment, within the limitations prescribed by law.

The record entry of the clerk, under the sanction of the court, is a higher species of evidence than the bill of exceptions.

ERROR to Linn District Court.

S. C. Hastings, for the plaintiffs, referred to *Walters v. Jenkins*, 16 Serg., and R. 414; *Commonwealth v. Gibson*, 2 Virg., Cas., 70.

C. Bates, for the United States, contended that there is not such a substantial variation between the judgment of the court and the verdict of the jury, as to justify reversal, *Simmons v. United States*, Morris 490.

Opinion by KINNEY, J. This was a prosecution in the district court of Linn county, against the plaintiffs in error, upon an indictment for a riot. The defendants pleaded not guilty. The cause was tried upon the issue joined, and the following, as appears from the transcript of the record, was the verdict of the jury, and the judgment thereon by the court.

"Now at this time, to wit, Sept. 18th, 1844, came into open court, the jurors of the jury, heretofore, on yesterday

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empaneled and sworn to try the issue joined in the above entitled cause, and upon their oaths aforesaid, do say that they find that the defendants, Charles C. Cook, Benjamin F. Cook, William R. Lewis, and Wilbert L. Lewis, are guilty in manner and form, as they stand charged in the indictment in this case. Therefore, it is considered by the court, that the said defendants, Charles C. Cook, Benjamin F. Cook, William R. Lewis, and Wilbert L. Lewis be imprisoned in the common jail for the county of Linn, for the term each of one hour, and that they pay to the United States, a fine of three dollars and fifty cents each; and it is farther considered by the court, that the said defendants pay the costs of this prosecution, and stand committed in the jail of said county, until the payment be fully complied with."

A motion was filed by counsel for the defendants for a new trial, after the verdict of the jury, and before judgment was rendered thereon, which was overruled by the court. After the rendition of the judgment, a motion was filed by defendants to set aside the verdict upon the ground, that it was not authorized by law. This motion was also overruled by the court, and thereto the defendants excepted, as appears by the following bill of exceptions. "Be it remembered that the evidence of this case having been closed, and the jury having been charged, and retired to consider of their verdict, returned into court the following verdict in the words and figures following, to wit: 'We, the jury, find the defendants guilty, and assess their fine at three dollars and fifty cents, and imprisonment one hour. Jesse Holman, foreman.'" And the court thereupon (the jury having dispersed,) ordered the verdict to be entered in manner as set forth in the records in this case. And the said defendants moved the court to set aside the verdict in this case, for the reason that it was not authorized by law, to be found by the jury. Said bill of exceptions also contains other matters, extraneous to the legal points arising in this case.

The case comes before this court upon a writ of error, and the plaintiffs assign as error, 1. The court erred, in refusing to set aside the verdict, and grant a new trial. 2.

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The court erred in making the jury find the verdict entered in the records. 3. The court erred in amending the verdict without the consent of the jury, they having dispersed. 4. The court could not assess the fine and punishment. 5. The verdict of the jury was uncertain, and contrary to law, and should have been set aside.

The first question that we will dispose of is the one presented by the bill of exceptions. Did the court err in overruling the motion of the defendants below to set aside the verdict after judgment? and this is the main point raised by the bill of exceptions for the adjudication of this court. After the verdict of the jury had passed into a judgment, entered as such upon the records of the court, we are at a loss to know how the court could under such circumstances, set it aside.

The verdict having passed from the hands of the jury into the possession of the court, and the court having placed the verdict beyond its control by rendering a judgment upon it, we think the court could not, without first opening the judgment, entertain a motion to set aside the verdict. Having disposed of the only material point made by the bill of exceptions, we will examine the other questions which are presented by the assignment of errors.

Did the court err in refusing to grant a new trial? A motion for a new trial, based upon facts, is a motion addressed to the sound discretion of the court. While all the facts, upon which a conviction has been obtained, are fresh in the recollection of the court, if the court, in the exercise of its sound discretion, think that the verdict of the jury is contrary to law, or is not the legitimate result of testimony, and that manifest injustice will be done by a judgment upon the verdict; or, as in a criminal case, by inflicting the punishment to which the verdict is but the precursor, the court should always interpose, and grant a new trial.

But if the court, on a motion predicated upon facts exclusively, should refuse to grant a new trial, how can this court, adjudicating upon the legal errors of an inferior tribunal, decide that, in the exercise of its sound discretion, upon

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matters of fact, it thereby committed error? To give this court jurisdiction of a cause on writ of error, the basis of the error being the decision of the court upon a motion for a new trial, it must appear affirmatively upon the record, that the motion was based and decided upon some legal point contained in the motion for a new trial. If the defendants had been entitled by law to a new trial, and upon their application the court had refused it; then, upon the matter coming before the court, the error of the court below could have been corrected. In this case, it merely appears in the record, that a motion for a new trial was made, without showing upon what grounds, and, for aught we know, it may have been based upon facts, and very properly overruled by the court.

The next question, and only material one for us to decide, is, was the verdict of the jury, and the judgment thereon by the court, in accordance with the statute.

The statute under which the defendants were indicted provides, that the persons so offending shall each, on conviction thereof, be fined in any sum not exceeding two hundred dollars; and be imprisoned in the cell of the jail of the county, not exceeding twenty days. *Rev. Stat.*, 185, § 5.

This section of the statute, it will be observed, fixing the punishment attached to a conviction, has neither fixed the fine to be imposed at a certain amount, nor has it fixed the length of the imprisonment to a definite time. Latitude, as to the amount of fine and period of imprisonment, is given either to the court or jury, or both. *Rev. Stat.* 158, § 87, reads as follows: "Where any latitude is left as to the amount of the punishment for any offence, the jury who try the offender shall in all cases fix the amount of the punishment."

This statute was approved January 4, 1839. The act under which the defendants below were tried and convicted, was approved February 16, 1843. Section 76 (a) declares, "that in all cases, where any person shall be convicted of any offence, by this act declared criminal, and made punishable by

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imprisonment in the penitentiary, or county jail, the judge shall determine, from the nature of the case, to what period of time, within the respective periods prescribed by law, such convict shall be imprisoned."

This section of the statute only confers upon the court the power of fixing the period that the convict shall be imprisoned, and does not, either by intendment or otherwise, give the court any authority to fix the amount of fine—the other branch of the punishment consequent upon a conviction for riot. Thus, section 5, (a) under which the defendants were tried and convicted, has not prescribed definitely the amount of the fine, nor the time of the imprisonment, but confined them within certain limits.

The 87th section, (*Rev. Stat.*, 158,) gave the jury the power of fixing the entire punishment, in cases where there was any latitude.

The 76th section of the act of 1843, before referred to, required the judge to fix the period of imprisonment, clearly repealing so much of the section of the act of 1839 as required the jury to fix the entire punishment; but still leaving, as we believe, the jury to fix the amount of fine in all cases punishable with fine and imprisonment; and where there is latitude, as in this case. We think this the most reasonable construction that can be given to these various sections of the statute.

Was the statute, then, complied with by the verdict, and the judgment of the court below, in this case? As appears by the record, the jury returned a verdict against the defendants, of guilty, as charged in the indictment; whereupon the court fined the defendants three dollars and fifty cents each, and adjudged that they be imprisoned in the county jail for one hour each, &c.

The bill of exceptions shows that the jury assessed the fine and imprisonment. It purports to set out, in substance, the verdict of the jury. The record entry of the clerk must be regarded as a higher species of evidence than the bill of exceptions.

(a) *Rev. Stat.* 185.

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In the case of *Pierce v. Crafts*, 12 John., 90, there was a material variance between the entry of the verdict, by the clerk, and the verdict in the bill of exceptions; and the court say, "that it is not strictly the office of a bill of exceptions to ascertain the amount of the verdict. The clerk received and enrolled the verdict, under the direction of the court, and we must presume the record to be made up according to the official entry of the clerk, which is the best evidence in the case."

The record entry of the clerk shows that the jury found the defendants guilty only. The verdict of the jury, as contained in the bill of exceptions, shows that the jury found them guilty, and assessed their fine at three dollars and fifty cents, and imprisonment one hour. In the first, there is error, as the jury should have assessed the fine. In the latter, there is also error, as the jury had no right to fix the time of imprisonment.

In the judgment, there is error, as the court, under the statute, in a case of this kind, had no right to fine the defendants. As the verdict upon the record is erroneous, it is not necessary to pass upon the other points raised by the assignment of errors; or to determine whether the court had a right to amend the verdict after the jury had dispersed. (a) If the verdict had been amended, it should appear in legal form upon the record.

The judgment of the court below will therefore be reversed, and the cause remanded for a new trial.

Judgment reversed.

(a) *The State v. Underwood*, 2 Ala., 744; *Sargent v. The State*, 11 Ohio; 62. *Cam. v. Watson*, Morris, 52.

Wise v. Hine.

WISE v. HINE.

In an action of ejectment, the verdict of the jury should expressly name the party in whom they find the right of possession ; where the jury in such an action omit in their verdict an important item of property, upon which issue was joined, and submitted to their finding, it is a substantial defect, and one that cannot be corrected by the action of the court ; and it was erroneous to render judgment upon such a verdict.

The supreme court has no greater power than the district court, to alter a defective verdict.

ERROR, to Lee District Court.

J. C. Hall, for the plaintiff in error.

C. Walker, for the defendant.

Opinion by WILLIAMS, C. J. This was an action of ejectment, instituted by Hine against Wise, to recover the possession of certain lands and appurtenances in the town of Keokuk, Lee county, and described in plaintiff's declaration as follows : " The two story dwelling, south west of the Rapids Hotel, which was occupied by the said J. H. Wise as a grocery and store ; also lot ten, in block four, with the appurtenances, all in the town of Keokuk in said county," to the immediate possession and ownership of which, the plaintiff below alleged that he was entitled. The declaration also charged that the possession was withheld from him by the defendant, and claimed damages for the unlawful detention of the premises. On the trial in the court below, a verdict was rendered for the plaintiff, as follows : " We, the jury, find the right of immediate possession and ownership in the two story dwelling, south-west of the Rapids Hotel, which was occupied by the said James H. Wise as a grocery and store, in the town of Keokuk, and assess his damages for the detention thereof at the sum of one hundred dollars and eighty-seven cents."

The court thereupon entered judgment as follows : " Therefore it is considered by the court here, that the said plaintiff

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be restored to his possession, and recover said property of said defendant, as well as the sum of one hundred dollars and eighty-eight cents for his damages and the costs of this suit, and that a writ of possession and writ of execution issue therefor.

This cause coming on writ of error for trial at this term, the plaintiff makes the following assignment :

1. The court erred in rendering judgment upon the finding of the jury.
2. The court erred in rendering judgment for a greater amount of damages than was assessed by the jury.
3. The court erred in awarding restitution of premises that were not described.
4. The court erred in overruling the motion to arrest the judgment below.

The first question for the consideration and decision of this court, is presented on the finding of the jury. The verdict should, in substance, respond to the issue joined between the parties to the action (1.)

Does the verdict in this case respond substantially to the issue? It is the opinion of the court that it does not. In the first place, the finding of the jury is not in express terms for the plaintiff, nor is it indeed for any person, unless, by a resort to strict grammatical rule, it might be made a verdict in favor of the defendant, against whom the judgment is rendered. It would have been quite as much power as the court could properly exercise to remedy this difficulty, by giving form to the verdict, so as to give the benefit of it to the plaintiff in this action, without entering upon the province of the jury. But the jury omitted to make any finding in the verdict upon an important item of the property claimed in the declaration, and included in the issue joined. "Lot ten, in block four, with the appurtenances" is not found by the jury to be the property of the plaintiff or the defendant. This is a substantial defect in the verdict, which the court could not supply, without entering upon the province of the jury. The court had power to put the finding of the jury into proper legal form; but could not

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interfere, so as to alter, supply, diminish, or in any way change it in substance. This court cannot with propriety exercise any more power than the court below could in curing the defect in the verdict. The most this court could do would be, if the proper state of facts existed, to enter here such a judgment as should have been entered by the court below. This cannot be done without violating a rule of law well established. It is our opinion that the court erred in entering judgment on the verdict as rendered by the jury.

The plaintiff in error having relied chiefly on the first assignment, and the argument having involved, substantially, those remaining, we consider it unnecessary particularly to notice them.

The judgment of the court below is reversed, and a *venire de novo* awarded.

Judgment reversed.

(1) *Middleton v. Quigley*, 7 Halst., 352; *Holmes v. Wood*, 6 Mass., 1; *Patterson v. United States*, 2 Wheat., 221; *Kilbourn v. Waterous*, Kirby, 424; *Fenwick v. Logan*, 1 Mis., 401; *Moody v. Keener*, 7 Port. Ala., 218; *Vines v. Brownrigg*, 2 Dev., 587; *Garland v. Davis*, 4 How., U. S., 181; *Crommelin v. Minter*, 9 Ala., 594.

PAYNE v. COUCH AND KINSMAN.

A note, payable in specific property, is admissible in evidence under the common or money counts.

ERROR, to Washington District Court.

Hall and Everson, for the plaintiff in error.

C. Bates, for the defendants.

Payne v. Couch.

Opinion by WILSON, J. This was an action of assumpsit, brought upon the following instrument :

“ \$100.

Twelve months from date, we promise to pay J. G. Smith, or bearer, one hundred dollars, to be paid in horses or other good property, at cash prices, for value received.

Mt. Pleasant, Feb. 10, 1841.

(Signed.)

D. A. COUCH.

O. O. KINSMAN.”

On the note is the following endorsement, viz: “ I assign the within note to Jesse D. Payne. J. G. SMITH.”

The declaration contains a special count setting out the note; counts for money paid; laid out and expended; had and received; and the account stated. To this declaration a special demurrer was filed for the following causes :

1. The breach in said declaration does not state that said horses, or property, were not paid to the plaintiff's endorser.
2. The breach in said declaration assigned, is not coextensive with the plaintiff's undertaking.
3. The breach does not show but that said note was paid before the commencement of this cause.
4. It is stated in said declaration, that J. G. Smith to whom, or to whose order the payment was to be made, endorsed said note, when it is stated to have been made to bearer.

This demurrer was sustained, and judgment rendered by the court below in favor of the defendant in error for costs, and the sustaining of this demurrer, is the error relied upon.

It is contended by counsel for the plaintiff, that the note was admissible under the common counts in the declaration. If so, then the defendant's objections to the declaration are answered.

The case of *Crandal v. Bradley*, 7 Wend., 311, (a) is directly in point. In that case, suit was brought on a note, whereby the defendant for value received, promised to pay the plaintiff or bearer, \$8,65, by the first day of April next, after the date of the note, in common stuff pine boards, delivered at Frog-street point, with interest. The court held, that “ on the

(a) *Waldrad v. Petrie*, 4 Wend., 575; *King v. Wall*, Morris, 187.

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authority of the cases of *Smith v. Smith*, 2 John., 235 ; and *Pierce v. Crafts*, 12 John., 90, that a note payable in specific articles is admissible in evidence under the money counts." We do not wish to go farther than other courts of high authority, in sustaining technical objections, particularly in suits upon promissory notes, in which case the statute requires the plaintiff to file with his declaration a copy of the note sued upon ; and where there is no reason to apprehend that the defendant will suffer injury from ignorance of the plaintiff's cause of action. The judgment of the court below is reversed, and the cause is remanded, with directions to proceed under the declaration.

Judgment reversed.

 BURKHART v. SAPPINGTON.

Upon a note drawing ten per centum interest, it is erroneous to make the judgment draw the same rate of interest. It should draw only six per centum as regulated by statute.

Error, to Des Moines District Court.

J. C. Hall, for the plaintiff in error.

Grimes and Starr, for the defendant.

Opinion by KINNEY, J. This was an action of assumpsit, brought upon the following note, to wit :

" TERRITORY OF IOWA, county of Des Moines, 1841.

" \$ 128.

" On or before the sixteenth day of April, A. D. 1841, I promise to pay Dr. John Sappington, of Saline county, Missouri, or bearer, the sum of one hundred and twenty-eight dollars, for value received, with interest, from date, until paid, at ten per cent.

" Given under my hand, this 13th day of April, 1841.

" JOHN BURKHART."

Burkhart v. Sappington.

The interest was computed upon the note, added to the principal, and a judgment entered against the defendant for the sum of one hundred and seventy-four dollars and thirty-two cents, with interest thereon, at the rate of ten per centum per annum, until paid.

The cause comes before this court upon the following assignment of error:

That the judgment bears interest at the rate of ten per cent. in opposition to the statute.

The point made and relied upon before this court by counsel for plaintiff is, that the court erred in allowing the judgment to bear ten per cent. interest per annum upon the interest which accrued upon the note.

We think this position well taken.

The case of *Wilson v. King*, decided by the supreme court of the territory of Iowa, at the July term, 1841, (a) in which the court decided that the judgment should bear the same rate of interest as stipulated to be paid by the contract; we think the court went quite as far as the authorities and statute would permit. We are now asked to go farther, and allow the interest, after it passes into a judgment, to bear ten per cent.

The statute of Iowa has fixed the rate of interest at six per cent., but allows parties to contract in writing for a rate not exceeding ten per centum per annum. (b)

The defendant, by his contract, agreed to pay ten per cent. upon the amount stipulated to be paid, and not ten per cent. upon the interest that would accrue upon that amount.

The statute, therefore, having fixed the legal rate of interest at six per cent., and the defendant, not having contracted to pay ten per cent. upon the interest, we are clearly of the opinion, that the interest that accrued upon the note when it passed into a judgment should only bear six per cent. as fixed by the statute.

Judgment below will therefore be set aside, and the cause remanded for a new trial.

Judgment reversed.

Calkin v. The State.

CALKIN v. THE STATE, *on the relation of* HAMPTON.

The publication of a statute in newspapers, without the direction or authority of the general assembly, is not sufficient to give it effect, as required by the state constitution.

ERROR, to Johnson District Court.

Information in the nature of a *quo warranto*, against Asa Calkin, for unlawfully holding the office, and exercising the duties of director, in the first school district of Iowa City township. By an agreed statement of facts, filed in the district court, on the 24th of June, 1847, it appears that Calkin had been holding the office from the first Tuesday of April previous, and had been exercising the duties thereof, by virtue of an election authorized by an act of the general assembly of the state, passed January 24, 1847. Upon the trial below, the defendant pleaded this election in answer to the information; and to this plea, the prosecuting attorney demurred. The demurrer was sustained by the court, on the ground that the statute under which the election was held, had not been published as required by the fourth article and twenty-seventh section of the state constitution.

A. Calkin, pro se. There is but one question presented to the court in this case. Was the act in force at the time of the election?

It is not contended that the law had been published in pamphlet form, and distributed prior to that time. Still we contend that the constitution and laws of the state, relative to the publication of the laws, had been virtually and substantially complied with. The law had been published and generally circulated throughout the state, long prior to that time. The provisions of that law were as well and generally understood then, as at the present time. The law had been published in the public newspapers, printed in Iowa City, under and by the direction of the secretary of state, who by the laws of the state has supervision of the publication and distribution of

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the laws ; and copies of it were sent by him into every county in the state ; and the law was received and acted upon by the people at large, as being in full force. And it is believed that a contrary decision would be most ruinous in its effects upon the common schools throughout the state ; inasmuch as schools have been established under that law, and are generally in a flourishing condition.

C. Bates, for the state. Whether the act in question was in force at the time of the election, is a fact that the court will notice *ex officio*. "The existence of public acts must be tried by the judges, who are to inform themselves in the best manner they can." 1 Coke on Lit., 28, n. 16.

The constitution of this state declares that, "No law of the general assembly, of a public nature, shall take effect until the same shall be published and circulated in the several counties of this state, by authority. If the general assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the state."

Under the provision of the constitution, it is clear that the act could not take effect until after it had been published and distributed by authority.

It is admitted that this act was published prior to that time, in the Iowa Capital Reporter and Iowa Standard, two newspapers published at Iowa City, but without authority.

No shadow of authority, direct or implied, from the general assembly, can be found to justify this publication. There is nothing in the act itself authorizing its publication in newspapers, though it does provide that this act shall take effect from and after its publication.

That the general assembly understood the constitution, and intended no law to take effect by publication in newspapers, except by express legislative provision to that effect, appears by a "joint resolution concerning the taking effect of acts public and private," approved February 24, 1847. (See laws of that year, p. 202.)

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As a farther evidence of the intention of the general assembly, in relation to the act in question, and their construction of the constitution, reference may be had to the acts passed at the same session, and it will be seen that not less than forty-two of the acts contain each a special provision for their taking effect in newspapers. These acts extend through the entire session, commencing with the first one passed.

When publication and distribution of the laws are named in the constitution and acts; it is meant that they shall be published and distributed according to the established method, in pamphlet or book form.

The secretary of state, by the second section of the act in relation to his duties, (Laws of 1847, p. 30,) is required to furnish the printers authorized to print the laws, with all laws and resolutions, and "cause to be printed at the end of each volume of the laws, so printed, his certificate, that the foregoing acts and resolutions are truly copied from the original rolls in his office."

The said secretary, in pursuance of this law, printed at the end of the laws and resolutions, his certificate, which bears date, May 1, 1847; and this proves that said act could not have been published and distributed in this manner, until after this time, and consequently could not have been in force on the first Tuesday in April, unless the voluntary publication by two newspapers, could have breathed it into life, and given it force and effect, contrary to the express letter of the constitution and will of the general assembly.

Opinion by WILLIAMS, C. J. This case is here, by agreement of parties, filed on record in this court. The plaintiff in error seeks to reverse the judgment of the district court of Johnson county, ousting him from the office of school director of the first school district in Iowa City township, Johnson county, which office he had been exercising since the first Tuesday of April, 1847.

The facts of the case are fully set forth in the agreed statement of the parties, and present but one question for decision in this court, viz.:

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“Was the act of the legislature of Iowa, relating to common schools, approved January 24, 1847, in force on the first Tuesday of April, 1847?”

In adjudicating the question here presented, the court is directed by the facts admitted, and in proof before it, and by the constitution and laws of this state, which we think clearly and satisfactorily determine the question.

The constitution of this state provides, that “no law of the general assembly, of a public nature, shall take effect until the same shall be published and circulated in the several counties of this state, by authority. If the general assembly shall deem any law of immediate importance, they may provide that the same shall take effect by publication in newspapers in the state.”

It is conceded here, and sufficiently before this court in legal form, that the law, by virtue of which the respondent claims to hold and exercise the office of school director, was not “published and circulated in the several counties of this state, by authority,” until the first day of May, 1847; that the election for school director was had on the first Tuesday of April, 1847; and that he had exercised the duties of the office since the first Tuesday in April, 1847. Farther, the school law in question is clearly of a public nature. Thus he was elected, and in the performance of the duties of the office for one month before the law had been “published and circulated,” as required by the constitution of the state. The proceeding to an election, and qualification of the officer, with his assumption of official duty under the provisions of the law, was clearly giving effect to it; and without the previous publication and circulation, by authority, was directly prohibited by the constitution. Without proceeding to argue the propriety of notifying the people fully of the provisions contained in laws by which they are to be governed, particularly here, where all understand and appreciate it, we merely say, on this part of the case, that a compliance with the terms of the constitution was necessary to give life, motion, energy, and effect to the law.

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The plaintiff in error claims that he is sustained in holding the office of school director, and should be protected from the ouster, because some of the newspapers of the state published the law; and the notice of its passage and provisions was thus made public. This brings us to the latter clause of the constitutional provision before cited.

When and how is notice of the enactment and approval of a law to be given, so that the same may take effect, otherwise than by "publication and circulation in the several counties of the state?" Clearly, when the law is deemed of immediate importance. By whom deemed of immediate importance? The general assembly. In such case, so determined by them, they may provide that the same shall take effect by publication in newspapers in the state. Here, the general assembly is to judge of the necessity and propriety of this special mode of publication. They, only, are authorized to provide for the notice, as to the particular enactment, which may be of immediate importance. The constitution is the supreme law of the land. The general assembly of the state, as well as others in office, who may be legitimately called and qualified to make or execute the laws, are bound by its requirements. This, or any other law of a public nature, must be published, by authority, as by the constitution is required. The power "to deem any law of immediate importance, and provide for the publication thereof in newspapers in the state," is vested in the general assembly alone. A failure by that body to make such provision could not vest any other functionary of state, or citizen, with authority to publish such a law, so that the same would be vital, and take effect, and render proceedings under it legally valid. In the case here under consideration, it is clear that, at the time of the election to the office, and the assumption of the exercise of its duties and privileges by the plaintiff, the law had not been "published and circulated in the several counties of this state, by authority," nor had any provision been made by the general assembly for its publication, according to the express terms of the constitution. To say that a publication of the law, by

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some person or persons, other than the general assembly, without authority from that body, would be proper and legal, would be to nullify the constitution, and tend to confusion and irresponsibility in a matter of grave and vital importance to the public. The legislature is the representative embodiment of the sovereignty of the people; to it is intrusted the law-making power, involving the endurance and general welfare of the community, and to it, therefore, has the constitution wisely given the right and power to provide for an emergency, such as obviously arose under the provisions of the law in question.

The 47th section of the act, (a) by virtue of which the plaintiff claims to hold the office of director, provides that the law "shall take effect and be in force from and after its publication." This, legitimately understood and construed, can only mean and intend such publication as is prescribed by the constitution, where a law shall not be deemed of immediate importance by the general assembly. This court, with the explicit terms of the constitution before it, cannot presume that any other publication was intended, when no special provision is contained in the law, or elsewhere, to authorize such presumption. Indeed, the general assembly, on the 24th day of February, one month after the approval of the school law in question, at the same session, passed resolution No. 21, Pamphlet Laws of Iowa, page 202, which is as follows:

"Resolved, That all acts of a public nature shall take effect from and after their publication and circulation in the several counties in this state, by authority, except such acts as contain special provisions for their taking effect by publication in newspapers in the state, which shall take effect accordingly." By the adoption of this resolution, the legislature has fully recognized and promulgated the spirit of the constitution, and shown their understanding and appreciation of its provisions in this matter. In view of the whole case, without anticipating or advertg to consequences which might accrue from the illegal assumption and exercise of powers, under a law involving in its

(a) Laws of 1847 p. 135.

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execution so many interests both of a private and public nature. This court is of opinion that the act of the legislature of Iowa, relating to common schools, entitled "An act supplemental and amendatory to 'An act to establish common schools,'" approved January 16, 1840, and which was approved January 24, 1847, was not published, as required by the constitution of the state, so as to take effect, and was not in force on the first Tuesday in April, 1847. The judgment of the district court of Johnson county, ousting and excluding Asa Calkin from the office of director in the first school district in Iowa City township, Johnson county, is affirmed.

Judgment affirmed.

DUNHAM v. BENEDICT.

When the error alleged is not apparent of record, the legal presumption is, that the proceedings in the court below were correct.

ERROR, to Louisa District Court.

J. W. Woods, for plaintiff.

Henry W. Starr, for defendant.

Opinion by WILSON, J. We see no error in the record in this case. The plea, to which the demurrer was sustained, and the sustaining of which is alleged as error, is not set forth, and we cannot say whether it was sufficient or not. The presumption with us, therefore, is, that the proceedings in the court below were correct.

Judgment affirmed.

O'Halloran v. Sullivan.

O'HALLORAN v. SULLIVAN.

In a petition for a mechanics' lien, it is sufficient to describe the lot as being "number seven hundred and fifty-one in the city of Dubuque;" and the following description of the house was held to be sufficiently certain: "a brick house, upon said lot, to be twenty feet by thirty, two stories high, and a cellar."

If there was a want of common certainty in such a description of the lot, it was incumbent upon the defendant to show wherein the defect or uncertainty consisted.

The defendant waives any irregularity in the filing of a *precipe*, by appearing and pleading in the case.

ERROR, to Dubuque District Court.

This was a petition filed by M. J. Sullivan against B. J. O'Halloran, for a mechanics' lien. The defendant pleaded the general issue, and notice of set-off. Trial by jury, and a verdict of one hundred dollars for the plaintiff below.

S. Hempstead, for the plaintiff in error.

T. Davis and *P. Smith*, for the defendant.

Opinion by WILLIAMS, C. J. There are two errors assigned in this case by the attorney for the plaintiff in error.

1st. That the petition does not describe, with common certainty, the tract of land, or town lot, upon which said lien is intended to operate.

2d. There was no *precipe* filed in the case in which the name of the action is specified, according to the form of the statute in such case made and provided.

The *Rev. Stat.*, 381, § 2, provides "that the suit shall be commenced by bill or petition, describing with common certainty the tract of land, town lot, building, mill, or machinery, upon which said lien is intended to be made to operate."

There is no bill of exceptions or other proceeding of record in the case, by which this court can know what evidence was adduced on the trial below, touching the description of the lot

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and building the plaintiff sought to make subject to the lien and judgment by virtue of the statute. We cannot go after matter out of the record to impeach or contradict what there appears. The only thing before us containing a description of the lot or building is the petition of the plaintiff. Does that describe the property, on which the lien is intended to be made to operate, with common certainty? In it the property is thus described: "A certain lot of ground situate in the city of Dubuque, and known and described as lot number seven hundred and fifty-one;" and further states, that "the said O'Halloran entered into a contract with your petitioner to build a certain brick house upon said lot of the description following: that is to say, to be twenty feet by thirty, two stories high, and a cellar under said house, and to be finished by the 25th day of October next." Is there common certainty, as by the statute is required, in this description. If the description here given were not such as, by the recorded plat of the city of Dubuque, would be found to be correct; or if by any other means it could have been made to appear that the property is not described with common certainty, it was incumbent on the defendant to make the defect in the description manifest by proof in accordance with law. Upon failure to do this, the legal presumption is in favor of the proceedings of the court below. The error complained of must be in matter of record in order to entitle the party complaining to an adjudication of this court. Adopting this legal presumption as here stated, how stands this case? In his petition the plaintiff describes the property, on which he seeks to secure his lien and judgment, as "situate in the city of Dubuque, lot number seven hundred and fifty-one." We have no legal way of discovering that this does not describe the lot with the usual and common certainty. A particular lot in a regularly laid out town, or city, is usually found to contain a given quantity of land, according to the survey and plat recorded, and by its number can be readily found and known. It has been urged here, that there are in-lots and out-lots, according to the manner in which the city of Dubuque is laid out. How this may

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be, we know not from the record; we find nothing there to authorize us to adjudicate that fact. For aught that appears before us, the description of the property is given in the petition, so far as the lot is concerned, with the certainty required by the statute.

How is it as to the building? This is described as upon the lot above alluded to. Its length, breadth, and height are set forth, with the addition of a cellar; and it is called a brick house. We think it would not require any unusual and arduous exercise of official acumen on the part of the proper functionary of the law to avoid mistake in finding the property described, and applying properly the process of law consequent upon the lien and judgment, should such process be issued. It is our opinion that, as this case is presented to this court, by the record, the statute has been complied with.

The second and only remaining assignment of error is answered by the record. It there appears, by endorsement on the back of the petition, that Crawford and Rogers, attorneys, filed their *precipe* in the following words: "The clerk will please issue a summons returnable to June term of the district court for 1846." The record shows that the defendant, without objection as to this point, proceeded to a trial by jury, on the merits of the case, on issue joined. By his pleading to the merits and making up his part of the issue, the legal presumption is, that he ascertained satisfactorily the character and name of the action, and waived the requirement of the statute as to the *precipe*.

The judgment of the court below is affirmed, and a *procedendo* awarded.

Judgment affirmed.

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GAY v. LLOYD.

The acts of congress relative to the authentication of public acts, records, and judicial proceedings, have no reference to inferior tribunals, created by municipal law, such as justices of the peace; but they refer to the proceedings of courts possessing general jurisdiction.

The method of authenticating the correctness of a justice's transcript, is left to the statutory regulations of the respective states; and should conform to the law of the state in which they are to be adduced in evidence.

Under the statute of Iowa, the certificate that the person making a transcript, was a justice of the peace, as therein stated, should come from the clerk of the county court, under the county seal, and not from the clerk of a court of common pleas; unless the laws of the state from which the transcript is brought, should be produced to show that he was the proper officer to certify the same.

Parole evidence that the defendant examined the transcript of a justice, and acknowledged that the judgment had been rendered against him by the justice therein named, is admissible, and entitles the transcript to faith and credit; although the defendant did not admit it to be a correct copy of the original record, and declared the judgment to be unjust, but that it had not been paid. Such admission concedes the official character of the justice, and the amount of the judgment. In such an action the justice of the judgment cannot be inquired into.

While it will be presumed in law, that a court of general jurisdiction acted within the sphere of its authority, a court of limited and special jurisdiction will be required to show the law conferring the jurisdiction it exercised.

After the correctness of the judgment and the jurisdiction of the justice, are duly established, the same faith and credit are given to them, as is given to the judgment of a court of general jurisdiction.

ERROR, to *Des Moines District Court*.

David Rorer, for the plaintiff in error.

Grimes and Starr, for the defendant.

Opinion by WILSON, J. This was an action of debt, brought by Lloyd for the use of *Prise* against Gay, before a justice of the peace, in *Des Moines* county, on the transcript of a judgment from the docket of *Isaac C. Copen*, a justice of the peace of *Hamilton* county, *Ohio*, wherein Lloyd was

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plaintiff, and Gay defendant. Judgment was rendered against Gay by the justice of the peace in Des Moines county, and the case was appealed to the district court, where judgment was also rendered against Gay. The case is brought into this court by writ of error. The transcript from Coplen's docket was certified by him to be correct; there are also two other certificates appended to the transcript, one purporting to be from the clerk of the court of common pleas, of Hamilton county, Ohio, certifying to the official character of Coplen, and sealed with the seal of that court; and lastly, the certificate of the presiding judge of the court last mentioned, as to the official character of the clerk of the court. The case was tried before the justice of the peace, in Des Moines county, and also in the district court on issue joined, on the plea of *nul tiel record*. On the trial in the district court exceptions were taken by Gay, which are set forth in the bill as follows, to wit:

"Be it remembered, that on the trial of this cause in the district court, the plaintiff offered in evidence to the jury, an alleged transcript of a record, and the certificates thereto annexed, and then proved by parole evidence, that said transcript had been presented to the defendant, and examined by him, and that he then admitted that the judgment had been rendered against him, by the justice before whom it purports to have been rendered; but the witness could not say that the defendant admitted the transcript to be a true copy of the original record of said justice; but the defendant at the same time, said that the judgment, so admitted to have been rendered against him, was unjust, and that he had never paid it. And thereupon, without any other evidence, the transcript was offered and read to the jury; to which the defendant objected: 1. For want of proper and legal authentication under the act of congress, of May 26, 1790; or under any other act of congress. 2. The transcript is not sufficiently certified under the statute of Iowa; or otherwise sufficiently and legally proven. 3. Section 19, Rev. Stat., 329, is unconstitutional and inoperative. These objections were severally overruled by the court, and the transcript and certificate were allowed to go in

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evidence to the jury, without any other authentication. To all which the defendant excepted.

Be it farther remembered, that on the same trial, after the argument of counsel, the court charged the jury that said transcript was entitled to full faith and credit here, no matter how proven, whether under the statute of Iowa, or by parole evidence, to be an exemplified copy, the same as if certified in strict conformity with the act of congress, in relation to the manner of proving the judicial proceedings and records of the courts of these several states, in each state and territory respectively, passed May 26, 1790; and that the justice of said judgment could not be inquired into in this action.

And under the proof aforesaid, after the court had charged the jury as aforesaid, the defendant moved the court to charge the jury, that the justness of said supposed judgment is open to inquiry in this trial. That defendant's admissions must all be taken together, if proven by plaintiff, and that if the jury find the proof to be, that said judgment was unjust, then they must find for the defendant; which charge the court refused to give to the jury. To which refusal the plaintiff excepts, &c."

The following errors are assigned:

1. In admitting to the jury, as evidence, the supposed transcript of the judgment.
2. In admitting parole proof of the correctness thereof.
3. In instructing the jury that the justness of the judgment could not be brought in question.
4. In refusing the instructions asked for by defendant in the court below.
5. In giving those asked for by the plaintiff in the court below.

We will consider these objections in the order in which they are presented in the bill of exceptions; and,

1. Was the transcript properly admitted as evidence to the jury?

The act of congress, of May 26, 1790, entitled an "Act to prescribe the mode in which the public acts, records, and judicial proceedings, in each state, shall be authenticated, so as to

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take effect in every other state," and the act supplementary thereto, approved March 27, 1804, do not provide a mode for certifying the judgments of justices of the peace. Such is the decision of the courts of New Hampshire, Massachusetts, Vermont, Ohio, and most of the federal courts, upon these statutes. These courts place their decision on the ground that the constitution, and act of congress above mentioned, refer to the judicial proceedings of courts of general jurisdiction, and not to inferior tribunals created by municipal law; for the act of congress requires the record to be certified by the clerk, with the seal of the court annexed, together with a certificate from the judge, chief justice, or magistrate of the court, as to the due form of the attestation. Justices of the peace, having no clerk, no official seal, and not being able to authenticate records in the manner required by the act of congress, their proceedings were not considered as coming within the purview of that act, but the admission of the copies of their proceedings as evidence was left to be regulated by the law of the state where they were proposed to be offered in evidence. (See 3 Cowen and Hill's Notes to Phillips on Evidence, 898, and the authorities there cited.) The introduction of the transcript of the proceedings of the justice of the peace in Hamilton county, as evidence, not being authorized by the acts of congress above referred to, and that matter being left to the law of our state, it will be necessary to examine the statute upon this subject enacted by the legislature. This statute is as follows: "The official certificate of any justice of the peace, living in any state of the United States, certifying any judgment by such justice rendered, with a certificate thereon sealed by the clerk of the county with the county seal, where such justice shall reside, certifying that he whose signature appears on such exemplifications was, at the date of such judgment, a justice of the peace, and qualified to act as such, shall be good and legal evidence in any court in this territory, to prove the facts contained in such exemplifications and nothing more." (1)

Were the transcript and certificates admissible in evidence under this statute? We think not. The statute requires

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that the certificate of the justice should be followed by the certificate of the clerk of the county, sealed by him with the county seal. The certificate of the justice in this case is followed by the certificate of the clerk of the court of common pleas of Hamilton county. We cannot judicially know that the clerk of the court of common pleas is the clerk of the county; unless we take judicial cognizance of the laws of the state of Ohio, and say that the court of common pleas of Hamilton county is the county court, we must decide that the justice's transcript was inadmissible under the statute. There might be, for aught we in this case judicially know, a county court of Hamilton county, as well as a court of common pleas; the latter court could not be presumed to be the former, with any more propriety than the circuit court of one of the counties of Illinois could be presumed to be the county court. As individuals, we may know that in that state there is in every organized county a circuit court, as well as a county commissioner's court, and the clerk of the last mentioned court is, by the laws of that state, the only person authorized to certify as to the official character of justices of the peace. Were we to receive the certificate of the clerks of one of the circuit courts of Illinois, as evidence that any particular person was a justice, it might be very unsafe; for this clerk might have no farther means of knowing who are the justices of the peace, than those possessed by any other individual, and his certificate would be entitled to no farther credit. It is the officer who has peculiar means of knowledge as to who are the justices of the peace, alone, who can certify to their official existence; the officer with whom their bonds and oaths of office are filed, and to whom their resignations must be made. And here we answer an objection that may be urged, to wit: That some states have no county courts *eo nomine*, and that, to carry out the foregoing views, we must also decide, that judgments of justices in those states which have no county courts cannot be enforced in this state, because the transcripts of them cannot be certified to, according to the requisitions of the statute. Such is by no means a necessary consequence. To say that

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no certificate could be received as to the official character of a justice of the peace, except the certificate of the clerk of the county, would be to put upon our statute a construction more literal than just or reasonable. We only decide that where such certificate is made by the clerk of any court other than the clerk of the county, the law of the state from which the transcript is brought should be produced, to show that he was the proper person to certify the same. See, upon this subject, 6 N. H., 567—570. We think, therefore, that the certificates appended to the transcript did not authorize its admission as evidence.

Did the parole testimony render it admissible? It was proved, by parole testimony, that said transcript had been presented to witness, and examined by him, and that he then admitted that the judgment had been rendered against him by said justice, before whom the alleged judgment purports to have been rendered; but witness could not say that the defendant admitted the transcript to be a true copy of the original record of said justice. Witness also stated, that at the time of said admissions, defendant, as part of the same conversation, said that said judgment so admitted to have been rendered against him was unjust, and that he had never paid it. The issue presented to the court was upon the plea of *nul tiel record*. This plea avers, in substance, that there is no record of such a judgment as that mentioned in the transcript. The admission of Gay, after examining the transcript, is, that that judgment was rendered against him by that justice. Making this admission upon an examination of the transcript, the testimony, if credited, would warrant the conclusion, that such a judgment did exist on the record of Coplen, the justice. It is but a fair construction of the admission, to say that it concedes the official character of the justice, the amount and character of the judgment, and that it was unsatisfied. Did the statement in the admission that the judgment of the justice was unjust, so vitiate the whole admission, as that the judgment of the court in the premises could not be based upon it? The issue was as to the existence of the judgment, and not whether it was just

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or not. The defendant in the court below admitted the existence of the judgment, and set up a defence which could not avail him under the issue; (1) if indeed he could set up such a defence in a court of law. We see no error in the charge of the court to the jury, in reference to the faith and credit to be given to them.

We have also settled the last question presented by the bill of exceptions, that the justness of the judgment could not be inquired into in this action. Not only would the issue in this case prevent such inquiry, but the weight of the authorities shows that no such inquiry can be made at law, under any plea.

The last question arising in the case is, did the plaintiff in the court below make out his case sufficiently, putting the most favorable construction on his testimony, to warrant a verdict in his favor? The bill of exceptions shows that the testimony stated in it, and above recited, was all that was offered by either party. Was it necessary for the plaintiff below to introduce the statute of Ohio, and show, affirmatively, that justices of the peace in that state have jurisdiction and authority to render such judgments as that set forth in the transcript? The true doctrine, and the one established by the great weight of authorities, is this, that where the court of another state, whose judgment is sought to be enforced here, is a court of general jurisdiction, the presumption is in favor of its jurisdiction, and the onus of impeaching it rests with the defendant; where the court has but a limited and special jurisdiction, as that of justices of the peace, the statute of the state must be introduced to show, affirmatively, that the justice had jurisdiction, for the courts of one state will not take judicial notice of the statutes of another. See 3 Cowen and Hill's Notes, 906, referring to 19 John., 33., 9 Wend. 95; 2 Wils., 16; 1 Saund., 73, 74; 5 Cranch., 173; 1 Peters, C. C. 30; 8 Cowen, 311.

Where the judgment of the justice of the peace, and his jurisdiction, are duly shown, the same faith and credit are given to them, as is given to the judgments of a court of general

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jurisdiction, authenticated under the act of congress, and is not subject to re-examination. The jurisdiction of the justice not having been proven, the court erred in permitting the transcript to be offered in evidence to the jury. The judgment of the court below is therefore reversed, and the cause is remanded to the court below for further proceedings not inconsistent with this decision.

Judgment reversed.

(1) The plea of *nul tiel record*, to an action on a judgment of a sister state, draws nothing into controversy except the existence of the record. *Goodrich v. Jenkins*, 6 Ham., 48.

CASES
IN
Law and Equity,
DETERMINED IN THE
S U P R E M E C O U R T
OF
THE STATE OF IOWA ;

IOWA CITY, JANUARY TERM, A. D. 1848,

In the second year of the State.

PRESENT:

HON. JOSEPH WILLIAMS,* CHIEF JUSTICE.

HON. S. CLINTON HASTINGS,† ‘ ‘

HON. JOHN F. KINNEY, }
HON. GEORGE GREENE, } JUDGES.

DAVIS *v.* ALEXANDER.

A case having been once determined in the supreme court, it cannot be brought up a second time, by writ of error.

ERROR, to Van Buren District Court.

C. Walker, for the plaintiff in error.

J. C. Hall, for the defendant.

Opinion by KINNEY, J. In this case a judgment was rendered in the district court of Van Buren county, upon the 11th day of July, 1845, against plaintiff in error, for the

*Term expired Jan. 25, 1848.

†Appointed Jan. 26, 1848.

Davis v. Alexander.

sum of \$578,33. Exceptions were filed to the opinion of the court below, and a writ of error sued out from the supreme court; and on the 24th day of January, 1846, the case having been tried before the supreme court, the judgment of the court below was affirmed, and a writ of *procedendo* awarded, which, as appears from the record, was filed in the office of the clerk of the district court, on the 25th day of February, 1846.

Upon the 20th day of March following, a second writ of error was issued, and upon security having been given, a second order of *supersedeas* awarded. The case therefore finds its way a second time into this court.

A plea, with a verification that the case had once been tried in the supreme court, and the judgment of the court below affirmed, was filed by defendant in error. To which a special demurrer was filed, assigning :

1. That the former writ of error was dismissed for the want of the notice required by law, that the writ of error had been sued out.
2. That by law, a party has three years, after the rendition of the judgment, to prosecute a writ of error.
3. That although the law authorizes the court to affirm the judgment, if notice of suing out the writ of error be not given, yet the judgment so given does not decide that there is no error in the judgment of the court below, but merely that the writ of error has not been presented as the law requires, &c.

From an examination of the record, it appears that the judgment of the court below was affirmed, and a writ of *procedendo* awarded.

The question presented then by the record and pleadings for our decision is, does the statute give the unsuccessful party in the supreme court the right of bringing the case again before the court upon a second writ of error.

The statute provides that writs of error may issue upon orders, decrees, and judgments of the district courts. (a) It also provides, that unless the proper notice is given to the adverse party of suing out the writ of error, the judgment of the

(a) Laws of 1844, p. 6, § 3.

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court below shall be affirmed. (b) Also, that the court may award such process to carry into effect its judgments, as is deemed proper. (c)

The court in this case having rendered a judgment, and awarded a *procedendo* to carry that judgment into execution ; now, to entertain jurisdiction to correct that judgment, would be unauthorized by the statute, and would establish a precedent, not only unexampled, but that would tend to manifest injustice and confusion ; the legitimate result of which would be, to burthen the supreme court with writs of error issuing upon its own judgments, thus tending to prevent the final settlement of causes. If a writ of error can issue upon the judgment of this court, a writ of error might also issue upon the judgment rendered, upon the hearing of that writ of error ; and so on *ad infinitum*, and the supreme judiciary of the state, instead of being what the constitution and law intended, a court for the correction of errors, it would become an agent in the hands of disappointed suitors, to prevent the very object of its organization.

The judgment of the court below, being swallowed up by the judgment of this court, the writ of error therefore cannot reach that in the court below ; but seeks to correct the judgment of this court, which is wholly inconsistent with its judicial existence.

It does not appear by the record in this case, that the writ of error was dismissed for the want of notice. If it did, the statute making it the duty of the supreme court to enter a judgment of affirmance in all cases where the proper notice has not been given, as a penalty upon the plaintiff in error for his own neglect, we would still be at a loss to know how this court could correct the errors of its own judgment upon writ of error. The demurrer of plaintiff in error is overruled, and the writ of error dismissed.

Writ of error dismissed.

(b) Laws of 1844, p. 7, § 11. (c) *Id.*, p. 9, § 84.

Allen v. Dunham.

ALLEN v. DUNHAM.

The division of the state into four judicial districts, by the statute which took effect on the 10th day of February, 1847, produced a vacancy in the office of district judge in each judicial district; which vacancy continued till the election of district judges by the people on the first Monday in April following.

During such vacancy no writ could issue from the district court with the requisite attestation of the judge.

The territorial judges, holding over under the constitution of the state, could not act as judges of the supreme court, and also of the district courts; as the two offices in the same person are constitutionally incompatible.

The note of the secretary of state, appended to an act of the general assembly as published in pamphlet form, stating that the act was published in certain papers at a given date, is not evidence of the fact.

The courts will determine, as they are bound and are presumed to know, *ex-officio*, when a law takes effect.

ERROR, to Des Moines District Court.

Grimes and Starr, for the plaintiff in error. The only ground for this decision is, that on the 4th Feb., 1847, a law was approved by the governor, dividing the state into four districts, (Laws of 1847, p. 39;) and that the effect of dividing the state into four districts was to vacate the office of Charles Mason, as judge of the first judicial district.

To this we reply:

1. That the law had no such effect. The organic law provides for a chief justice and two associates, who are required to hold a supreme court for trial of writs of error and appeals from the district courts of the several counties, and whose duty was also to preside in the district courts of the counties to which they might be assigned by the territorial legislature.

That legislature did divide the territory into three districts, and did assign, by law, Charles Mason to preside in the district courts of the first judicial district. That district embraced the county of Des Moines, and the law relied on embraces the county of Des Moines in the first judicial district.

The constitution of Iowa, in the schedule, adopts and con-

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tinues in force all the laws of Iowa Territory, until altered or repealed; and furthermore, requires all officers in said territory to exercise the duties of their respective offices and appointments until superseded under the constitution. The constitution provided for superseding Judge Mason by a judge, to be elected by the people. The state legislature directed said judge to be elected in April, 1847. Until the election, then, there could be no successor; and he must continue to be presiding judge up to the election, because the law assigning him to the first judicial district was adopted as a law of the state, and was in full force.

2. But if the court shall determine that the law referred to would, in effect, oust Judge Mason from his appointment as judge of the first district, a still graver question arises, whether, on a motion to quash, the court had a right to treat the law as in force on the 26th Feb., 1847.

The last section of that law provides that it shall take effect by publication in newspapers. It was approved February 4; but whether it had been published at all in newspapers does not appear from the statute book. There is a printed memorandum in relation to it, which was inserted without any authority of law, and which the defendant admits proves nothing.

How, then, could the court determine that it was in force February 26; and if they were wrong in fact in so deciding, how could the plaintiff rectify that wrong, if such a decision is allowed to be made on a mere motion to quash? No opportunity is afforded to us to prove that the law was not in force, and thus protect ourselves.

We could only do this upon a plea in abatement, by defendant setting up the matter of abatement and showing it to have arisen prior to the date of our writ; we could then join issue and examine the truth of the plea.

But the court below presumed the law to be in force; not professing to know the fact, or to have any evidence of it.

Our constitution has changed the ordinary rules. Formerly the time our laws took effect was ascertained from the date of approval, or the terms of the law itself, when it specifies the

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time when a law shall go into operation. But now the taking effect of a law depends upon the happening of an event, which can only be known to have transpired by inquiry and evidence, which may be disputed, and about which both individuals and juries might disagree.

To assume to know such a fact without evidence would be strange presumption; but how much more so, when the presumption is made against a record, and to annul it. In law, a record imports absolute verity—that every fact stated in it is true. And no adjudication can be found allowing a fact to be presumed against a record.

We claim, then, that the defendant should have pleaded in abatement, to enable us to produce evidence to show our right to test the writ in the name of the judge; and could not be permitted to move to quash.

All that we ask is, that when a party, either plaintiff or defendant, claims a law to have been in force at an earlier day than the statute book proves it to have been, he shall establish the fact by evidence in the usual way.

A contrary decision will enable a court to enforce a statute in cases where it is not the law, with impunity.

David Rorer, for the defendant. 1. There was no judge at the date of this writ in whose name it could legally be tested. By the act of the legislature of Iowa, dividing the state into judicial districts, passed 4th February, and which went into force on the 10th February, 1847, the old districts are repealed and annulled; and, after that date, there was no district judge in whose name to test the writs; for Judge Mason, though judge, was not assigned to the new district so created.

In answer to this, we are told, that there is no evidence that this law had been published in newspapers, as required by its own language, and the constitution; and that without such proof it is a nullity. We answer to this, that its publication is known and taken notice of by the court as a matter of history; and if this act is void on the ground alleged then,

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the authority of the district and supreme courts, to sit as such, is not warranted by law; for the act organizing the latter, and the act providing for the election of the judges, were published in the same manner, and rest on no higher authority. So, if the court below could not enforce the law which it did, this court, on the same principle, has no power to question what was done below. The doctrine is suicidal to the whole judicial authority of the state. Cited, laws of 1847, p. 39; *ib.*, p. 119, §§ 1, 2, and 3; and *ib.*, pp. 66, 68, §§ 1 and 9.

Opinion by GREENE, J. A motion was made and sustained in the court below, to quash the original writ, because it does not bear test in the name of the district judge, as required by statute. (a) The decision upon that motion is the only error assigned in this case.

It appears that the suit was originally commenced, and summons issued, on the 26th February, 1847. But, on the fourth day of the same month, a law was approved by the governor, and on the tenth of that month took effect, by publication in newspapers, dividing the state into four judicial districts. (b) This law having taken effect before the suit was commenced, and there having been no election till the following April, the judges under territorial appointment not having been designated to the new districts, it is assumed for the defendant in error, that there was no judge of the district court in whose name the writ could bear test, and that as a consequence it could not issue with the requisite legal attestation. To this conclusion we can see no legitimate objection.

Though true, Judge Mason, in whose name the writ bore test, had an appointment under our territorial organization, and the constitution of Iowa adopted and continued in force all territorial laws, till altered or repealed, and authorized all officers of the territory to exercise the duties of their offices till superseded under the constitution; still, the new

(a) *Rev. Stat.*, 468, § 1.

(b) *Laws of 1847*, p. 39.

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law, dividing the state into four judicial districts, evidently abrogates those portions of the old law which divided the territory into three districts, and assigned a judge to each. And thus, the territorial judges, even if authorized by the constitution to act in the double capacity of district and supreme judges of the state, are left without authority or jurisdiction over any particular district. If they were authorized by the constitution to officiate as district judges, yet as they were not designated to particular districts under the new districting law, and there being more districts than judges, it was evidently impracticable and unauthorized to set apart any one judge to any given district, though corresponding in number to the district in which he formerly acted; and hence the districts remained alike destitute of judges till they were elected by the people.

But may it not be held, with much reason, that the territorial judges could not act in the two-fold capacity of supreme and district judges? Holding over and acting, as they did, as judges of the supreme court, their official powers were necessarily limited to that court under the constitution; by which the judges of the supreme court, as also those of the district courts, are limited in jurisdiction and office to their respective courts. In becoming the judge of one court, the incumbent is rendered ineligible to the office of the other. See sections 3 and 4, in the 4th article of the constitution. The organic law of the territory authorized the judges of the supreme court to act as judges of the district courts, but the constitution of the state renders the two offices in the same person incompatible; and therefore, the territorial judges could hold over only in the capacity they assumed as judges of the supreme court.

It is contended by plaintiff's counsel, that though the law of 1847 would, by districting the state anew, leave an interregnum in the office of district judge, still the court had no right to treat the law as in force on the 26th February, 1847. It is provided by the last section of that law, that it shall take effect from and after its publication in newspapers. The only evidence in the statute of its having been published in news-

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papers prior to the 26th February, is a printed note inserted after the act, stating that it was published in the Standard and Reporter, 10th February, 1847. As this note was inserted without authority of law, it is very properly claimed that it proves nothing. And if it proves nothing, it is asked, how could the court determine that the law was in force on the day the writ issued? The ordinary rule for the taking effect of a law is changed by our constitution. Instead of going into operation, as formerly, from the date of its approval, or from a particular day in the law stated, it cannot now take effect till published and circulated in the several counties of the state; or, if deemed of immediate importance, from its publication in newspapers. The question now arises, how is the fact to be determined by or proved to a court when an act of the legislature takes effect. What the laws are, what are in force, and when they commenced taking effect, are matters properly cognizable and within the purview of the courts themselves. As a judge is presumed to know what the law is, so is he presumed to know when it is in force. And as he will, *ex-officio*, notice when a law is enacted, he will in like manner notice its publication and circulation, or its publication in newspapers, when these things are constitutional requisites to the operation of a law.

Judgment affirmed.

CAUDILL v. THARP.

Under the statute of 1842, regulating practice in the district courts, &c., a plaintiff was authorized to commence suit in the county in which he resided, if the cause of action accrued, or was to be performed there, and have process issued to the county in which the defendant resided.

It appearing by the declaration and copy of the note sued on, that at the date of the contract, the plaintiff was a resident of the county in which suit was commenced, it will be presumed, *prima facie*, that he resided there at the institution and determination of the cause.

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The defendant having been served with process, had his day in court, and should have appeared and objected to the jurisdiction of the court; having neglected to do so, it will be presumed that the court properly exercised jurisdiction.

ERROR, to Henry District Court.

David Rorer, for the plaintiff in error.

Henry W. Starr, for the defendant.

Opinion by WILLIAMS, C. J. Elihu M. Tharp, the plaintiff below, sued by action of assumpsit, in the district court of Henry county, to recover from James Caudill, surviving partner of Hiram V. Smith, the amount due upon a promissory note. The writ of summons was issued, in obedience to the terms of the precipe filed by the plaintiff's attorney; and directed to the sheriff of Lee county. The sheriff made return of the writ to the district court of Henry county, showing service on the defendant, Caudill, in Lee county. There being no appearance at the term of the court to which the writ was returnable, on part of the defendant, judgment was entered by default for the plaintiff.

The cause is here, at the instance of the defendant below, on the following assignment of errors:

1. The court rendering the judgment had no jurisdiction of the cause, when they rendered the judgment.
2. The judgment was taken by default, and without any legal service of the writ.
3. The whole proceedings were *coram non judice*.
4. The writ was directed to, and served in the wrong county, and there was no appearance by defendant.

The errors assigned put in question the jurisdiction of the court below, as to the matter involved in this action at the time of the rendering of the judgment in this cause. The objection presented is predicated by the agreement of counsel for the plaintiff in error, upon the record, which, by the precipe, writ of summons, and the return of the sheriff, shows

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the fact, that defendant, at the time of the institution of the suit, was not a resident of Henry county, and that he lived in Lee county. The writ of summons was issued on the twenty-first day of November, 1842; was served on the twenty-fifth, and return thereof made by the sheriff's deputy of Lee county on the twenty-eighth of the same month. The act of the general assembly of Iowa, entitled "An act defining the jurisdiction of the supreme and district courts," approved February 10, 1842, provides that "The district courts shall be held in each county; and the judges thereof shall have jurisdiction over all matters and suits at common law, and in chancery, arising in each county, in their respective districts; when the debt or demand shall exceed fifty dollars; and in all cases of appeal or *certiorari* from a justice of the peace, judge of probate, or the board of county commissioners, a plaintiff shall not sue a defendant out of the county where he resides, or where he may be found, unless the debt, contract, or cause of action occurred in the county where the plaintiff resides, or the contract was specifically made payable, or to be performed therein, when it shall be lawful to sue in such county, and process may issue to the sheriff of the county where the defendant resides." Iowa Stat. of 1842, p. 35.

In the proceeding complained of here, does the record show that the plaintiff below is justified by the provision of the statute? The declaration and the copy of the note which is the foundation of the action, allege and show that the contract was made in Henry county. Nothing appears here to this court to contradict the legal presumption that the plaintiff, (having been in Henry county at the time of making the contract,) still resided there at the time of the issuing of the summons and rendition of the judgment. The statute does not require that the plaintiff before instituting his suit shall show by affidavit or otherwise that he resides in the county within which he commences his suit, and that the contract was payable or occurred there. The plaintiff is allowed thus to sue in the two instances: when "the debt, contract or cause of action occurred in the county where he resides," or when "the

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contract was made specifically payable, or to be performed there," to sue in such county, and have process issued to the county where the defendant resides. There being nothing requiring the plaintiff to do so, we consider there is enough apparent of record here to warrant this court in presuming the continuance of his residence in Henry county. This presumption is raised and sufficiently sustained by the fact above alluded to, the making of the note in Henry county. Further, it does not appear that he resided at the time of the proceedings elsewhere. The defendant was aware of the prosecution of the suit—he had his day in court. Having neglected to appear and object to the jurisdiction of that court, with the record evidence of the facts touching the matter complained of before us, together with the legal presumption that what the court below did in adjudicating the facts of the case, was legally done, unless the contrary is properly shown, is sufficient to prevent this court from interfering so as to reverse the judgment.

The other errors assigned, being all founded upon the same facts presented by the first, and depending upon the same legal principles above considered, it is not necessary to examine them.

Judgment affirmed.

PAINTER v. WEATHERFORD.

The coverture of the defendant may be given in evidence under the general issue.

Where the defendant had been living apart from her husband, but both within the state, for about two years, when she gave a note as *feme sole* to the plaintiff who knew the fact of her marriage, it was error in the court to instruct the jury that the proof of coverture was no defence to the action on the note.

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ERROR, to Mahaska District Court.

C. Olney and *T. H. Gray* for the plaintiff in error. Was coverture in this case an available defense? A total renunciation of the marital rights by the married couple does not remove the civil disability of the wife to contract, sue, and be sued as a *feme sole*. If the husband is within the state and subject to its jurisdiction—if he has not absented himself permanently from the state,—no renunciation of the marriage relation by the parties, carried into practical effect for any length of time, can divest them of the character, duties, and liabilities with which the law invests them. They cannot thus divorce themselves. Permitting a *feme covert* to contract in case of the permanent absence of her husband from the state, is for her benefit, that she may not suffer for want of credit, and not for the benefit of a husband who thus disregards his social duties. So long as he is within reach of process, she can only contract for *necessaries*, and for those he, not she, is liable. *Gregory v. Pierce*, 4 Metcalf R., 478; *Gregory v. Paul*, 15 Mass., 31; *Abbott v. Bailey*, 6 Pick. 89.

The record does not show the husband's absence, and the coverture being shown, the burden is on him who would make her liable, to make out such a case as will create that liability. If coverture had been pleaded, absence must have been replied specially.

But, if coverture is not admissible in evidence under the plea of *non-assumpsit*, the defendant below was not prejudiced by the instructions against her on this point. The record shows that this evidence was objected to by the plaintiff below, and admitted by the court; and that he excepted. The coverture existed at the time of the contract, and goes to the validity of the contract itself, and not to the form of suit, or the parties, as matter of abatement. 1 Chit. Pl., 449-477.

By the new English rules, coverture, and all other defenses which admit the making of the contract in fact, must be specially pleaded; and we suppose objection was raised in this

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case on the strength of English authorities dating since the adoption of those rules.

J. C. Knapp, for the defendant. As to the charge of the court contained in the last bill of exceptions: there was no error in the charge, because the evidence showed that the defendant was in one of the situations which the law recognizes as an exception to the general rule, that a *feme covert* cannot sue or be sued in her own name—to wit, she was and had been for two years acting for herself, being separated, without hope or expectation of a re-union, from her husband.

So soon as a *feme covert* acquires a will and an interest distinct from, and independent of, her husband, the disability of coverture ceases. See Bacon's Abgt., 737.

"The law seems to be settled, that when the wife is left by the husband, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts; and the law is the same where the husband is banished for his crimes, or has voluntarily abandoned his wife." See Chitty on Contracts, 178, late edition, American note, (2,) referring to the case of *Rhea v. Rhenner*. 1 Peters, 105.

There is nothing clearer than, that error under the old rules before the recent rules, that all matters in discharge which showed that the plaintiff once had a cause of action, must have been pleaded specially. 1 Chitty Pl., 512, 513.

Again. It is a well settled rule, and ever has been, "That a matter of defence which admits the facts stated in the declaration, but avoids them, should be pleaded specially." 1 Chitty Pl., 514.

This attempt to show, as appears by the last bill of exceptions, the failure of the consideration—if it amounted to any defence at all, and was relevant—was matter that arose since the making of the note sued on, and was in evidence.

Even before the recent rules, it was usual to plead coverture specially. Though by an extraordinary relaxation it was suffered to be given in evidence under the general issue. 1 Chitty Pl., 516.

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Shall our courts then, even if they do not allow that the recent rules are a part of the common law in relation to pleading, adopt the course which is admitted to have been an exception to the correct rule, even before the recent rules; instead of the usual and correct practice? We should think not.

Opinion by KINNEY, J. This was an action of assumpsit, instituted by the defendant against the plaintiff in error, in the district court of Mahaska county, upon a promissory note for \$130, of which the following is a copy :

“On or before the fifteenth day of October next, I promise to pay William Weatherford, or bearer, the sum of one hundred and thirty dollars, for value received. Oskaloosa, August 20, A. D. 1845.

MARY PAINTER.”

Attest—J. W. CUNNINGHAM.

The declaration contained five counts. 1. A special count setting out the note. 2. For the price of goods bargained and sold. 3. For goods sold and delivered. 4. For work and materials. 5. For the *insimul computassent* count.

To this the defendant pleaded, first, the general issue; and secondly, for farther plea to the first count, that at the time the said note was given, the said Weatherford, and one Parish Ellis, made to said Mary Painter their certain promise, in writing, in these words :

“Know all men by these presents, that we, William Weatherford and Parish Ellis, of the county of Mahaska and territory of Iowa, for and in consideration of the sum of four hundred dollars in hand, paid by Mary Painter, of the county and territory aforesaid, do bind ourselves, our heirs and executors and administrators, in the penal sum of eight hundred dollars, to make or cause to be made, on or before the first day of July next, to Mary Painter, or her heirs, a general warranty deed, to south half of lot No. 2, in block No. 20, in the town of Oskaloosa, in said county of Mahaska, and territory aforesaid, or as soon thereafter as a deed can be obtained from the county

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commissioners of said county. Sealed this 20th day of August, 1845.”

“ The condition of the above obligation is such, that the said Mary Painter has this day made her promissory notes to the said William Weatherford, to wit: One calling for the sum of one hundred and thirty dollars, due on the 15th day of October next, and one for one hundred and twenty dollars, due on the first day of March next, and one note for one hundred and fifty dollars, due the first day of July next. Now, if the said Mary Painter shall complete the above payments, then this obligation to be in full force, and virtue in law, otherwise to be void.

WILLIAM WEATHERFORD,
PARISH ELLIS.”

Whereby the said Weatherford and Ellis undertook to convey, &c., setting out an ability to convey, and a non-performance, and concluding with a verification.

To the second plea there was a demurrer, which was sustained.

The cause was submitted to a jury at the September term, 1846, and a verdict and judgment rendered for the plaintiff for the amount of the note, interest, and costs.

From the first bill of exceptions taken in this case, it appears that, on the trial, the plaintiff below gave in evidence the promissory note set out in the first count, and rested. The defendant below then proved, that the note was given as part of the purchase money for the lot above mentioned, and offered the obligation of Weatherford and Ellis, set out in her plea, in evidence, and also offered to prove that the note sued on was one of the notes mentioned in said obligation to convey, &c. And to prove that said contract was annulled before suit brought, and that neither party had ever offered to carry the same into effect, &c.; which evidence was overruled and rejected.

The second and third bill of exceptions show, that on the trial the defendant below also offered to prove the coverture of

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the said defendant, to which the plaintiff below objected, and the court overruled the objections, and allowed the evidence of coverture to go to the jury.

The defendant proved that at the time of the making of said note she was the wife of one Jacob Painter, and that the plaintiff, Weatherford, knew that fact before and at the time. And thereupon the plaintiff proved that the defendant and her said husband, before the execution of the note, had separated with the intention never to live together again; and that they had been living apart about two years at the time the note was given, and had so continued, with no prospect of a reunion; and that the said Mary had, during the period of the separation, acted and contracted, openly and notoriously, for herself, as a *feme sole*. And thereupon the court charged the jury, that if they should find such to be the fact, they should find for the plaintiff, as the defendant would be liable, notwithstanding her coverture.

The defendant below brings the cause here by a writ of error from this court, and assigns for error :

1. The court erred in overruling the special plea.
2. In overruling the evidence offered by defendant below as set out in the first bill of exceptions.
3. In instructing the jury, as stated in the third bill of exceptions.

Much labor has been bestowed upon this case by the respective counsel, as is evident from the arguments and briefs of authorities submitted, exhibiting a degree of professional industry highly commendable.

Three questions are presented by the plaintiff in error for the adjudication of this court; but as the court have not access to all of the authorities referred to, bearing upon the first and second errors assigned, and as a decision upon them is not necessary for a reversal or affirmance of the judgment, we will examine the point raised in the bill of exceptions taken by the plaintiff below, as also the third assignment of errors.

It appears from the facts set forth in the bill of exceptions, that the defendant below pleaded the general issue, and under

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this plea offered to prove the coverture of defendant, to which the plaintiff objected, which objection was overruled by the court. Was this evidence properly admitted under the general issue? Upon a careful examination of all the authorities referred to upon this subject, we are inclined to the opinion that coverture, anterior to making the contract, may be given in evidence under the general issue. In Chitty, Pl., 207, we find this principle of law—"Under the general issue, the defendant may give in evidence, that at the time contract was entered into, defendant was an infant, lunatic, drunk, or *feme covert*; but coverture which has taken place since the making of the contract, must be pleaded in abatement. Also, see references in support of this authority. In the same volume, p. 388, the author says that coverture, at the time the contract was entered into, may be pleaded or given in evidence under the general issue, or *non est factum*. See also Term R., p. 545; also 1 Saunders' Pl. and Ev., p. 5; and Chitt. Pl., pp. 449 and 477. According to these authorities, emanating as they do from sources entitled to the highest respect and confidence, the court did not err in admitting this evidence under the plea of the general issue. The next question, as presented by the bill of exceptions, and the one forming the basis of our decision, is, did the court err in instructing the jury that coverture, under the facts as we find them in the bill of exceptions, was no defence to the action? It appears from the bill of exceptions, that the defendant proved that, at the time of making the promissory note declared on and given in evidence, she was the wife of one Jacob Painter, and that the plaintiff knew that fact before and at the time of making the contract. Whereupon the plaintiff proved that the defendant and her said husband, before the making of said note, had separated, with the intention never to live together again, and that they had been living apart about two years at the time the note was given, and had so continued ever since, without any prospect of a reunion; and that the defendant, ever since her separation, had acted, and continued openly and notoriously as a *feme sole*, without any dependence upon or in-

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terference from her said husband. And upon this state of facts the court charged the jury that they should find for the plaintiff, as the defendant would be liable notwithstanding her coverture.

It appearing, from the evidence advanced upon the trial, that the defendant was a *feme covert*, it is very clear that she could not be sued as a *feme sole* unless the peculiar circumstances under which she was situated removed the disability of coverture.

"The husband and wife are considered as one, her will is merged in his, and the power which she might have had as a *feme sole* to make contracts is suspended."

In exchange for the civic rights which she enjoyed as *feme sole*, she obtains the care, protection, and support of her husband, and an interest in his estate; but in acquiring these new privileges and blessings she brings herself within the disabilities of coverture, and the right of making contracts, of suing and being sued, must be yielded up to her husband: neither will a mutual agreement of separation release her from the legal restraint which the law has imposed upon her; nor can she in this way become restored to the rights which attach to a *feme sole*.

Lord Mansfield held, that in the case where the husband and wife had separated by agreement, she was liable. But in the case of *Marshall v. Rutton*, this class of cases was overruled; and Lord Kenyon, who delivered the opinion of the judges, observed, that there is no authority in the books that a woman may be sued as a *feme sole* while the relation of the marriage subsists, and she and her husband are living in the kingdom. This case was twice argued before all the judges excepting two, and all agreed in the opinion of Lord Kenyon. See notice in 15 Mass., 33, cases of banishment and abjuration; and where the husband has been attainted of felony and transported, it has been decided to be civil death of the husband; but we think the courts have never gone so far as to decide that an absence of two years under the same jurisdiction removed the liabilities of coverture. In the case of

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Gregory v. Paul, 15 Mass., 33, the doctrine is clearly laid down, that although the husband may have gone beyond sea without making any provision for his wife, she could not sue as a *feme sole*.

In the case of *Abbott v. Bailey*, 6 Pick., 90, the law is well settled, that while the parties remain within the commonwealth, although the wife may have been driven from the home of her husband, and the husband married a second time, yet, without a divorce, the coverture would continue, and she could neither sue nor be sued as a *feme sole*. See Story on Cont., p. 43; *Gregory v. Pierce*, 4 Met., 478.

But it is contended, by council for defendant in error in this case, that the plaintiff in error was exempt from the disability of coverture because of a permanent separation without any prospect of reunion. We think it clear, that parties cannot thus renounce their marriage rights, and that the marriage contract cannot in this way be made nugatory. A doctrine so dangerous and subversive in its consequences as this, is nowhere to be found in the books.

The separation in the case before us was only of two years' duration at the time the note was given, and both parties within the jurisdiction of the state; and although there was not any prospect of a reunion, yet we are of the opinion that the court erred in instructing the jury that the plaintiff in error was liable upon the note as *feme sole*.

This error being sufficient to reverse the judgment, the other points made in the assignment of errors are not decided.

Judgment reversed.

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The fact that a portion of the chattels were found upon the premises of the accused, eighteen months after they were stolen, unaaccompanied by other suspicious circumstances, is not *prima facie* evidence, that the accused was guilty of the larceny.

An application for a new trial on the ground of newly-discovered evidence, is usually confined to the sound discretion of the district judge, and the decision below cannot be reviewed and corrected by this court, unless made upon principles of law, or upon facts brought up in the record of the case.

It is a safer rule to require the affidavit of the newly-discovered witness to accompany the motion for a new trial.

It is no objection to the verdict on an indictment for larceny, if the jury find the aggregate value of the articles stolen.

{ A coon comes under the denomination of animals, *feræ naturæ*, and is not the subject of larceny.

A judgment against the prisoner on an indictment for larceny, will not be disturbed, merely because among the things stolen there was an item, on taking which, a person would not be liable for stealing, when it appears by the record, that the exclusion of that item could not reduce the nature of the offence, nor materially lessen the amount of the fine.

Under the statute of Iowa, it is not sufficient, in a criminal case, to swear the jury "the truth to speak on the issue joined," &c.

ERROR, to Clinton District Court.

W. E. Leffingwell, for the plaintiff in error, contended that the fact of stolen goods being found buried on the farm of the prisoner some twenty months after they were stolen, affords not a presumption against him, until it is clearly shown that he buried them there, or at least had a knowledge of their being buried there; and even at so remote a period, were they actually in his possession, the courts should have ordered him discharged, without having put him upon his trial, see 1 Car. and P., 452, where the only evidence against the prisoner was, that goods which were stolen sixteen months before, were found in the prisoner's possession. Bailey, J., directed an acquittal without calling on the prisoner for his defence, cited in 9 Petersd., 171, *note*; "The possession of stolen property soon

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after robbery, is not in itself a felony, it only raises a presumption that the prisoner is the thief.”

Recent possession of goods, not according to the habit and circumstances of the party charged, is a presumption against him. McNully, Ev., 579. Gilb't Ev., 899.

When a presumption is raised against the prisoner, from the fact of goods being found secreted about his premises shortly after the theft, it must be clearly shown that he must necessarily have known from his intercourse with, and access to the place where they were secreted, that he saw them, or that they could not have escaped his observation, in the necessary discharge of his daily avocation.

Presumptive evidence of felony should be cautiously admitted, for the law holds that it is better that ten guilty men should escape, than one innocent man should suffer. 4 Black. Com., 352; 2 Hale, P. C., 289.

Yet, notwithstanding these humane provisions of the law, the jury were instructed in this case, that the mere fact of the stolen property being found on the prisoner's land, buried some twenty months after they were stolen, was itself *prima facie* evidence that he stole it. If this decision is to be maintained as the law of the land, any evil-disposed person could at pleasure incarcerate any one on the slightest pretext. To recognize this as a correct rule of law, would be an innovation of the established practice; aye more, it would be an abrogation of all the decisions upon this one point, for the last hundred and fifty years.

Although the courts are not inclined to grant new trials, when the object is only to impeach a witness; yet they ought not to be so jealous of the reputation of a witness, as to prejudice the rights and liberties of a prisoner; and if, as in this case, the evidence discovered will establish the innocence of the accused, upon principles of justice, as well as of law, he certainly should have the benefit, even if upon the trial the guilt of his prosecutors should become apparent.

P. Smith, in his argument on the same side, cited 1 Cow. and Hill's notes, 424, 426; 5 N. H., 203.

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E. Cook, for the state, insisted that a new trial should not be granted on an affidavit stating that the newly discovered witness had told the party what he would say. *Shumway v. Fowler*, 4 John., 425.

"The newly-discovered testimony must go to the merits of the case, and not to impeach the character of a former witness. *The People v. The Superior Court of New York*, 10 Wend. 292.

"New trials will not be granted to impeach witnesses who testified on the former trial." *Halsey v. Watson*, 1 Caines, 24; *Duryee v. Dennison*, 5 John., 248. *Bun v. Hoyt*, 3 John., 255. *Jackson Ex. Dem. Rowley v. Kinney*, 14 John., 186."

"A party moving for a new trial, on the ground of newly-discovered evidence, is bound to produce the affidavits of the witness from whom such evidence was to come, setting forth the facts, or show that such affidavit could not be obtained." *Denn. v. Morrell, et al.*, 1 Hall, N. Y., 382.

"On a motion for a new trial, on the ground of newly-discovered evidence, a case of what transpired on the trial must be presented." Anon. 7 Wend., 331.

United States Digest, vol. ii, p. 754, sec. 65, on a charge of shop breaking and larceny, possession of part of the stolen goods is *prima facie* evidence of the larceny. 1 Mass. 6.

Possession of stolen goods is *prima facie* evidence of guilt, whether the circumstances amounted to a possession, or how far they were such as to rebut the presumption, is for the jury to determine. 7 Ver., 122; *State v. Weston*, 9 Conn., 527.

Opinion by GREENE, J. The plaintiff in error was found guilty in the court below on an indictment for larceny. A motion was made for a new trial, and overruled. We learn from the bill of exceptions that testimony was adduced on the trial, proving that about eighteen or nineteen months after B. S. Wilcox missed a number of traps, a boat-hook, &c., Shook, the prosecuting witness, proceeded with the officer, and a search warrant, to the house of Warren, and, after a slight search, repaired to a flax stack, five or six rods from the house; when

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one Fulk said to the officer, that "he was an old miner, and could strike a *load* in three licks." Though the ground was covered with snow, Shook showed Fulk where to dig; and he commenced accordingly, and, with the third blow of the mattock struck the lid of a box, identified as the property of Warren, which contained a portion of the stolen traps. They then went to the prisoner's blacksmith shop, and there found the boat-hook with the handle sawed off, on the shop floor, where it had been laying about for several months. It also appears, that Shook had been living with Warren, and that they had some difficulty a short time before the prosecution commenced. The court instructed the jury, though requested to give the contrary charge, that the fact of finding the traps in the manner described was *prima facie* evidence that Warren had stolen them. To this instruction of the court the plaintiff took exception, and now urges the objection under his first two errors assigned.

This charge to the jury was manifestly erroneous. The long space of time which elapsed from the missing to the discovery of the goods, the place, together with the peculiar circumstances under which they were found, concur in removing the presumption of guilt in the prisoner. Such a presumption is only created when the goods are found in the possession of a person, within a short period after the larceny. The lapse of three months after the articles were stolen has been recognized as sufficient to rebut the presumption of guilt, in a person in whose possession the goods were found; but it has been otherwise determined after the expiration of only two months, when connected with evidence of concealment, and other suspicious circumstances. 1 Cowen and Hill's Notes, 425, 426, and the references.

After the lapse of sufficient time for the goods to change hands, and when they are of a portable nature, it would often be attended with serious oppression and injustice, to require a person to account for the possession. Still more serious would be the consequences of taking a prisoner's guilt for granted, after so remote a period, and under the circumstances which are presented in this case.

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The place where the articles, were found the very suspicious deportment of one or two of those who participated in the finding, leave ample room to presume that others may have been more intimately connected with the larceny than the prisoner. In relation to the place, &c., of finding stolen goods, see Cowen and Hill's Notes, 426, 427.

By request of counsel, we will briefly notice the other errors assigned. The third avers that the court erred in overruling the motion for a new trial. As the charge to the jury was so manifestly improper, the motion for a new trial should have been granted. The only other reason assigned for a new trial, is that of newly-discovered evidence. This is a matter usually confined to the sound discretion of the district judge; because the application is often attended with circumstances which are not made apparent to the appellate court. The affidavit of the prisoner alone, setting forth the newly-discovered facts, and by whom he can prove them; taken in connection with other concurring appearances, and the applicability of the newly-discovered evidence towards affecting a material change in the verdict, has been held sufficient to justify a new trial, without the affidavit of the witness by whom the facts are expected to be proven; but the requirement of such an affidavit we regard as the safest practice. (a) Only in cases where the grounds for a new trial may be determined by the established principles of law, or upon facts appearing of record, is it clearly within the province of this court to revise and correct the proceedings below. (b)

It may be well to observe, that even in cases where the question of a new trial is within the discretion of the district court, the law contemplates a full hearing, and fair trial to all; and, if from any cause, a party having used due diligence, has not been able to present the substantial merits of his case to the jury, a rehearing should be allowed.

The verdict is objected to by the fourth assignment of error, because it is for the aggregate value of the articles stolen. In this we can see no error.

(a) *Bight v. Wills*, 7 B, Monroe, 122.

(b) *Cook v. U. S.*, ante 56; *Barzelton v. Jenkins, Morris*, 15.

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The fifth error assigned is, that part of the property averred to have been stolen, a rac-coon, is not the subject of larceny. The principle is well settled, that, taking from another's possession an animal, *fera naturæ*, or of a base nature, in contemplation of law, will not render a person liable for larceny; though the right of the owner would be protected by a civil action. As this principle applies, by common law, to monkeys, bears, foxes, &c., it will evidently apply to coons. 5 N. H., 204.

But, for this reason alone, the judgment of the district court would not be disturbed, when the indictment avers the stealing of other articles, properly the subject of larceny; and when it appears by the transcript that the nature of the offence could not have been reduced, nor the fine materially lessened by excluding the objectionable article.

The last error assigned, is, that the proper oath was not administered to the jury. The transcript of the record states, that the jury were sworn the truth to speak on the issue joined, &c. It is hardly necessary to state, that such an oath is not recognized by the statute. See *Rev. Stat.*, 298.

The judgment is reversed, and the cause remanded to the district court of Clinton county, for a new trial.

Judgment reversed.

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Under the criminal code of Iowa, an accessory before the fact may be indicted and convicted as principal.

ERROR, to Linn District Court.

Stephen Whicher, for the plaintiff in error. The indictment charges the plaintiff in error with larceny. The testimony is all set forth in the bill of exceptions, in which there is no pre-

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tence that the plaintiff in error committed the larceny, nor was it ever in any place so contended ; but the prosecution is sought to be sustained by our statute, which reads as follows : "Section 44. Accessories before the fact shall be deemed principals, and may be charged in the indictment with having committed the principal offence." *Rev. Stat.*, 153.

To this the plaintiff replies : 1. The 46th section of the same act, which enacts that "the body of an indictment shall be considered as made up of charges and specifications." 2. The sixth article of the amendment to the constitution of the United States : "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, &c., and to be informed of the nature and cause of the accusation." The statute relied on for the prosecution is in conflict with this clause of the constitution. The court should have granted a new trial.

E. H. Thomas and *C. Bates*, for the U. S. The indictment in this case charges the defendant in the court below with having stolen a mule. His counsel contend that the evidence did not establish that charge. It is not contended, but that the evidence fully established the fact that he was guilty as an accessory before the fact.

If he was accessory to the stealing of the mule before the larceny, does not our statute make him guilty of the larceny itself? It in effect declares all accessories before the fact principals. If accessories are deemed principals, then the same evidence that would be sufficient to establish his guilt as accessory, would establish his guilt as principal. *Rev. Stat.* 153, sec. 44, is in this language : "Accessories before the fact shall be deemed principals, and may be charged in the indictment with having committed the principal offense."

But it is contended by counsel that the above section is inconsistent with a part of the 46th section, which states, "That the body of an indictment shall be considered as made up of charges and specifications."

Wherein this is inconsistent with that, I am unable to perceive. In this case, the body of the indictment is certainly

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made up of the charges and specifications, and consequently is liable to no well-founded objection on this ground.

But it is farther insisted that said 44th section is in violation of the clause of the 6th article of the amendment to the constitution of the U. S., which states that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial," &c., "and to be informed of the nature and cause of the accusation."

Wherein does this conflict between this law and this clause of the constitution consist?

The accused in this case was fully informed of the nature and cause of accusation.

That the legislature had a right to declare an accessory before the fact a principal in the act, can hardly admit of a doubt. And, if so, then the evidence that would establish the fact that he was accessory before the fact, would also establish the fact that he was principal. In treason, riot, trespass, &c., all are principals; and may not the legislature make all concerned in larceny, before the crime is actually committed, principals? 1 U. S. Dig., 40, §§ 8, 12, and 13.

Opinion by WILLIAMS, C. J. The defendant, Jacob Bonsell, was tried in the district court of Linn county, at March term, 1844, on a charge of larceny, for stealing a mule. A verdict of the jury empaneled and sworn to try the cause on the plea of not guilty, was rendered, finding him guilty of the charge in the indictment. A motion to set aside the verdict, and arrest the judgment, was made, 1. Because the court has no authority in law to sentence the defendant, on the finding of the jury. 2. The indictment is defective and insufficient.

The motion for a new trial was made on the ground, that the verdict of the jury was contrary to the law and the evidence. Also, that the defendant was charged in the indictment as a principal, whereas the evidence submitted to the jury, if it proved him guilty of anything in the matter, could only make him accessory before the fact.

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These motions were overruled by the court. To this ruling of the court, the attorneys for the defendant excepted. This cause being here on the bill of exceptions then taken, the only question for adjudication by this court is as to the ruling of the court below, by which it was adjudged that an accessory before the fact might be indicted, tried, convicted, and punished as a principal, under our criminal laws. The 44th section of the act entitled, an act regulating criminal proceedings, *Rev. Stat.*, 153, is as follows: "Accessories before the fact shall be deemed principals, and may be charged in the indictment, with having committed the principal offense." This enactment of the legislature is couched in terms of plain import, presenting to the mind the intention of the law, free of any doubt whatever. The history of criminal jurisprudence has furnished ample evidence to establish the fact, that the cunning and cautious conceiver of crime, often in the use of available appliances, procures its perpetration by the hand of the reckless and desperate. Doubtless, the legislature acted in accordance with sound morality and reason, by providing that offenders equally guilty of crime shall be indicted, tried, convicted, and punished in the same manner. The counsel for defendant relies on the 46th section of the same act, cited by the attorney for the United States, which is as follows, section 46, "The body of the indictment shall be considered as made up of charges and specifications." We cannot see that there is any defect in the indictment, which would render it bad, in view of the requirements of this section. The indictment charges that the defendant "on the twenty-first day of January, one thousand eight hundred and forty four, in Linn county, aforesaid, a certain mule of the value of thirty dollars, of the goods and chattels of one Mullinea, an Indian of the Sac and Fox tribe of Indians, then and there being found, feloniously did steal, take, and drive away," &c. This, we think, is a direct charge of felony; and, being made by the statute proper and legal, defendant must be presumed to have known the law in force at the time the offense was alleged to have been committed by him; by virtue of which an accessory

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was deemed as a principal, and as such indicted and tried. We cannot see any conflict between these sections of the statute, or how the defendant, who, as appears by the verdict of the jury on the evidence, which accompanies the bill of exceptions of record, was found guilty of procuring, aiding, and abetting another in the commission of the offense, could have suffered grievance by reason of the want of more particular specification as to the manner and extent of his participation in the felony charged.

The sixth article of the constitution of the United States is also relied on to render inoperative the 44th section of the act above cited. This provides, that the accused "shall be informed of the nature and cause of the accusation." Does not the indictment here plainly set forth the nature and cause of the accusation? It is true the precise acts in detail are not specifically set forth in the indictment, nor is the manner in which they were done alleged, otherwise than is customary in cases of this kind. But the cause of accusation is, the stealing, taking, and driving away the property of another, and the nature of this wrong, so alleged to have been done by him, is averred to have been felonious. The act of the legislature does not conflict with the constitution in the points suggested on the part of defendant, nor do we discover that the defendant could suffer wrong, by depriving him of his right to a full and fair trial before a jury of his country.

Judgment affirmed.

STOCKWELL *et al.* v. DAVID.

Under the constitution, a proceeding in chancery can be brought to the supreme court only by appeal, under which the facts and the law of the cause will be fully reviewed and re-adjudicated.

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ERROR, to Des Moines District Court.

M. D. Browning, for the plaintiffs in error.

David Rorer, for the defendant, moved the court to dismiss the writ of error on the ground that it will not lie in a case in chancery, but should come up by appeal: 6th article of constitution, section 3d.

An appeal removes a cause entirely, subjecting the facts as well as the law to a review and new trial. It has its origin from the civil law; but a writ of error is of common law origin, and removes nothing for examination but the law. *Wiscart v. Dauchy*, 3 Dall., 321, 327; 1 Cond., 146; 3 Story, on the Constitution, 627, 628; Howard's U. S., 63.

Opinion by KINNEY, J. A motion is made in this case by the counsel for defendant in error, to dismiss the writ of error; for the cause, that this being a chancery case, a writ of error will not lie to this court.

The third section of the sixth article of the constitution provides, that the supreme court shall have appellate jurisdiction only in all cases in chancery, and shall constitute a court for the correction of errors at law.

The constitution has clearly defined the jurisdiction of this court, giving it upon the one side appellate jurisdiction in all cases in chancery, and constituting it, upon the other, a court for the correction of errors at law.

Although the constitution does not expressly forbid the supreme court from taking jurisdiction in chancery cases in any other way except by appeal; yet it was evidently the intention of the constitution, in prescribing the powers of this court, to confine its jurisdiction, in chancery cases, exclusively to appeals, and to the correction of errors in cases at law.

By an appeal, the whole case can be examined and tried as if it had not been tried before; but on writ of error, only those questions of law which appear of record.

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An appeal revises not only the errors of the inferior court, but also reviews the merits of the case.

As, then, an appeal secures to the party all the benefits of a writ of error, as well as a hearing upon the merits, and as the constitution has constituted this court an appellate court in chancery, and a court of errors at law, we are of the opinion that the proper and constitutional remedy in chancery is by appeal, and that a writ of error will not lie in a chancery case to this court.

The writ of error will therefore be dismissed.

Motion granted.

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A contract with an attorney to attend to a suit in the district court alone, does not authorize him without further authority to take the cause to the supreme court; nor can he recover compensation for services in the supreme court without showing that he was employed to render the service, or was in some way recognized by his client as attorney in the suit.

ERROR, to Jackson District Court.

Sanford and Smith, for the plaintiff in error. This is an action of assumpsit, brought to recover the price of plaintiff's services as an attorney in a case in this court.

The only point in the case, is, whether the fact of the plaintiff's having been employed as counsel in the case in the district court, was sufficient to authorize him to appear in the supreme court without any other authority. The district court decided that the plaintiff could not recover for his services in the supreme court unless he could show a special request by defendant for plaintiff to render said services; and decided that the mere fact of having been retained in the district court, furnished no authority to appear, and consequently no request

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could be inferred. We contend that where an attorney is retained in a cause in the court below, that he not only has authority to appear in the court above, but that it is his imperative duty to do so. *Dearborn v. Dearborn*, 15 Mass., 316; *Grosvenor v. Danforth*, 16 Mass., 74; 1 U. S. Dig., 329, §§ 89, 90.

Hopkins was liable to Crawford for the services rendered by him. 2 Phillips, Ev., 70.

The bill of exceptions shows that Hopkins was employed generally in the district court, and it makes no odds whether the amount of fees was agreed upon or not.

S. Hempstead, for the defendant. The defendant insists that there is no error in the decision of the court below; as it clearly appears by the bill of exceptions in this case, that there was a contract made by the parties that Hopkins, the plaintiff in error, was to attend to the suit in the district court for a certain sum. This is the extent of the contract as proven in the court below. The plaintiff in error seeks to charge the defendant, Mallard, however, without any promise or undertaking, with services in the supreme court, for the reason that he was employed in the district court to attend to the case there. It is denied that the defendant in error can be thus charged, as it does not amount on his part to a contract either expressed or implied. Although the plaintiff in error might have filed a written argument in the supreme court, and employed Mr. Crawford to attend to the case, yet there is no evidence whatever that the plaintiff was employed by the defendant to attend to the suit in the supreme court; some evidence other than this should have been offered to authorize such a conclusion—some evidence, at least, that the defendant recognized the plaintiff as his attorney in the progress of the suit in the supreme court. 9 John., 141.

It is contended that after the plaintiff in error had attended to the case in the district court, that his duties ceased. If the bill of exceptions showed that he had been generally retained, it would present a different case, but this was not the

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case, for it is obvious that the contract and price stipulated, were for the district court.

In the case of *Dearborn v. Dearborn*, referred to by the plaintiff in error, it will be found that the attorney in that case was a practitioner in the inferior and superior courts. There is no such proof in the case at bar ; from the statement it would seem that he had been generally retained. He was sued for negligence.

Opinion by GREENE, J. Hopkins sued Mallory in the district court of Jackson county, in assumpsit, for professional services as attorney at law, in the district and supreme courts. The intervention of a jury was waved by the parties, and the issue submitted to the court, under the plea of non-assumpsit. Verdict and judgment for the defendant.

The bill of exceptions shows that a specific agreement was made by the parties for professional service in the district court, and that the stipulated sum for that service, was paid by the defendant to the plaintiff. The plaintiff's bill of particulars contained a charge of \$25, for attending to the same cause in the supreme court. He proved that he had prepared a written argument, and all necessary papers in the case, and that he had employed James Crawford, Esq., to appear in this court ; but it does not appear by the testimony that there was a special request by the defendant to the plaintiff to attend to the suit ; and no evidence adduced showing that the defendant at any time recognized the plaintiff as his attorney in this court. In the absence of testimony, showing such request or recognition on the part of the defendant, we can see no error in the decision of the court below.

The plaintiff had been employed for a specific purpose ; he rendered the service and received the pay as per agreement. Having been retained to attend to the suit in a particular court, it cannot be inferred as a necessary sequence, that he was requested to attend to the same suit in the appellate court. Such an inference would often subject parties to great abuse and injustice. The interest involved in the trial below, is

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often of too trivial a nature to justify the expense of bringing the cause to this court, even if attended with the most successful result ; and therefore without showing some act distinctly implying a retention of counsel in the supreme court, or authorizing him to take the case up, his charges for service therein should not be recognized.

In the case of *Dearborn v. Dearborn*, 15 Mass., 316, referred to by plaintiff's counsel, we see nothing conflicting with the decision of the court below, in this case. In that case the attorney was employed and undertook to collect a debt ; it was justly held that he was bound to sue out all process necessary to that object. In the other cases referred to by counsel, the retainer appears to have been of a general, and not, as in this case, of a special character.

The principle involved in the case of *Hotchkiss v. Le Roy and Rogers*, 9 John., 142, is particularly applicable to the question before us. Hotchkiss the attorney proved the service ; and that he was recognized as the attorney by the opposite party in the suit in which the service was rendered, but gave no evidence that he was employed by Le Roy and Rogers. It was decided, that though hardly to be presumed that the suit was commenced and prosecuted without their consent ; but still that evidence ought to have been offered to the jury, to justify them in forming such a conclusion ; that some recognition of the attorney in the progress of the suit, might easily be shown ; and without such proof it would be unjust, and a dangerous precedent to make a party liable.

Judgment affirmed.

Phelps v. Pierson.

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In equity, when the bill sets out and seeks to enforce a usurious contract, it is not necessary for the defendant to plead the usury in order to prevent a decree for the usurious portions of the contract.

Before a debtor can secure aid in chancery to avoid usury in a contract, he should tender to his creditor the principal and legal interest.

A creditor, before seeking to obtain a decree upon a bill disclosing usury, should allege therein a willingness to abandon the usurious portion of the contract; otherwise a demurrer to the bill should be sustained.

APPEAL in Chancery, from Van Buren District Court.

A. Hall, for the appellant. This is a petition in chancery, to foreclose a mortgage upon a usurious contract, appearing so upon its face. It sets forth a loan of \$98; an agreement to pay a conveyance fee of \$2; and the execution of a note by defendant for \$125, payable in one year; and seeks a recovery or decree for the full amount.

To this bill there is a special demurrer, which the court below overruled, and gave judgment for the \$98 loaned, the \$2 conveyance fee, and interest at the rate of 25 per cent. till the time of judgment, amounting to \$150.64, and a decree of interest upon the principal, conveyancing, and usury.

The mortgage was executed on the 12th of October, 1842. The statute of 1838, regulating interest, was then in force. The second section of this statute forbids the taking of more than six per cent. interest, unless the contract is in writing, and then not more than twenty per cent.

The third section creates a forfeiture of the usury, and twenty-five per cent. interest upon the amount due, upon any person who shall take, accept, or receive in any way more than twenty per centum per annum.

In this case we make the following points:

If there was no plea, answer, or demurrer in this case, the court should reverse it, from the fact that judgment was given for usury in the contract as set forth in the bill, and for usurious interest, after the amount becomes due, and for interest upon the usury after due.

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The plaintiff, before he can ask equity, must first do equity ; his bill should pray for the repayment of the sum of \$98, the amount loaned, with legal interest ; for the court should not take notice of an illegal contract in equity, unless the party abandons his illegal act, and comes into court with clean hands.

The difference between courts of equity and law, in that particular, we believe to be this : That in law, a man may seek to recover the world, and if a penny is found his due, he may have judgment for his penny.

But true equity as administered by our courts, means : That he who seeks equitable aid from the error of a general rule, must himself be worthy of that aid ; that his acts in the case where aid is sought, must be honest and right, and he must seek right only. If his prayer is manifestly unjust and illegal, and the foundation of his prayer the same, a court of chancery should not pollute their records with a decree in his favor, even for the right, which it may seem that he hath ; but will direct him by decree to abandon his illegal contract and sue for the original consideration ; we cite, Story's Equity, 300 ; 5 John. Ch. R., 142, 143, 144 ; 2 Peters, 588 ; 4 Paige, Ch. Rep., 533 ; 4 Peters, 205 ; 1 Paige, Ch. Rep., 544 ; 11 Wheat., 305 ; 6 Cranch, 252 ; Laws of 1838, p. 276, §-2 and 3.

At law, it perhaps would have been necessary to plead usury ; but in chancery, this decree is bad if taken by default or demurrer.

Wright and *Knapp*, for the respondent. In this case it is conceded that the bill sets forth a contract where more interest was contracted for than is allowed to be taken by the statute of Iowa existing at the time. For this cause a demurrer was filed to the bill, and overruled by the court ; which overruling is the error assigned.

Usury can only be taken advantage of by plea. 2 Stewart, 420 ; Chitty on Con., 711 ; 1 Saunders, 295.

"Under a usury law which does not avoid the securities,

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but only forbids the taking a greater interest than six per centum per annum, a court of equity will not refuse its aid to recover the principal." *De Wolf v. Johnson*, 10 Wheaton, 367; 2 Bar. and Har. Dig., 107.

The defence of usury cannot be recognized unless on plea; and the demurrer was correctly overruled. 4 Paige, 538; Chitt. on Con., 711.

What is the prayer of the complainant? It is that "an account may be taken of what is due him for his principal and interest."

What was that? Why, the bill being taken as confessed, it was what appeared by the face of the papers. No plea, no answer; and on demurrer the court could not inquire farther. But this court can enter such judgment as the court below should have done. Laws of 1844, p. 9, § 31. When a demurrer may be filed. 1 Chan. Prac., 201—205.

Opinion by KINNEY, J. It appears from the record in this case, that at the September term of the district court of Van Buren county, 1844, William Phelps, as complainant, filed in the office of the clerk of said court a bill in chancery, against James Pierson and wife, to foreclose a mortgage upon the north-east quarter of the south-west quarter of section No. 22, in township No. 68, north of range ten, west of the fifth principal meridian.

The bill represents that on the 12th day of October, 1842, complainant loaned to said respondent, Pierson, the sum of ninety-eight dollars in cash, and paid for him by agreement the sum of two dollars—a conveyancing fee; in all, the sum of one hundred dollars; to secure the payment of which, the said Pierson and wife executed unto the said William Phelps a deed, in fee simple, for the above described premises, subject nevertheless to a condition of defeasance, upon the payment of the sum of one hundred and twenty-five dollars in one year thereafter, the same being for the principal and interest at the rate of twenty-five per centum per annum.

The bill also sets forth that neither the said sum of one hun-

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dred and twenty-five dollars, nor any part thereof, nor the said sum of one hundred dollars and interest thereon, at the rate aforesaid, was paid to orator at the time limited in that behalf, whereby the legal estate in said premises became vested in orator, &c.

The bill prays that an account may be taken of the amount due petitioner for his principal and interest in said mortgage, that the premises may be sold and the proceeds applied to the satisfaction of the said principal and interest, and such farther relief, &c.

To this petition the following demurrer was filed. And now comes the said defendant, and says that the matters and things contained in the said complainant's bill are not sufficient for the said complainant to have or maintain his aforesaid action against him, assigning for cause of demurrer :

1. That the bill sets forth a usurious contract.
2. The bill does not show a general cause of equity, nor does it exhibit a special cause ; but, on the contrary, assigns claims for decree upon a contract void in law for usury.
3. Said bill does not, upon its face, give complainant an equitable court for relief.

This demurrer was annulled by the court, and a decree *pro confesso* rendered against Pierson at the April term of said court, 1845, for the sum of one hundred and fifty dollars and eighty-four cents, being the amount reported to be due by the clerk who was appointed special commissioner to assess the damages. Whereupon an appeal to the supreme court was prayed for, and it appears in the court upon the following assignment of errors :

1. The bill sets forth a usurious contract upon its face, and seeks a decree for such usury.
2. The bill sets forth a loan of ninety-eight dollars, and a mortgage executed for the sum of one hundred and twenty-five dollars, payable in one year.
3. The court erred in rendering a decree upon a contract usurious upon its face.

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4. The court erred in ordering a decree for the usury in addition to the sum loaned with the legal interest.

5. The court erred in overruling the demurrer filed in the cause.

It is conceded by counsel for the appellant, that the bill sets forth a usurious contract, but that the defendant below could only take advantage of it by plea.

And the appellant asks this court, if they shall find the contract to be usurious, and the decree below, under the state of the pleadings, erroneous, to render such a decree as the court below should have rendered, to wit: a decree for the principal with legal interest, disclaiming the decree below for the usurious portion of the contract.

The bill sets forth upon its face a contract clearly usurious, reserving twenty-five dollars for the use of one hundred for one year.

The law in force at the time the contract was made forbade the taking, directly or indirectly, a rate of interest exceeding twenty dollars for the use and forbearance of one hundred dollars for one year, and at that rate for a greater or less sum or a longer or shorter time. See Laws of 1838, p. 276, §§ 2 and 3. The bill, after setting out a usurious contract, prays that the premises may be sold to satisfy the said principal and interest. The prayer of the bill clearly is for a decree for that which is not only forbidden by law, but for a court of equity to lend its aid in sustaining and enforcing a contract tainted with corruption. The bill exhibits its own immorality—testifies to its own guilt, and seeks to make a court of chancery, that should be ever pure in its administration of justice, a tribunal by which illegality is to be consummated.

It is a settled principle in equity jurisprudence, that he who seeks equity must himself not only do equity, but be worthy of the aid he seeks; and as the bill in this case bears upon its face its own turpitude, we are led to the first inquiry made by the points submitted in this case, to wit, was it necessary for the defendant below to plead usury to prevent a decree upon an apparent usurious contract, and that too, when

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the prayer of the bill sought to pollute the records with a decree for usury?

A plea was only necessary to bring to issue some matter of defence, or for the purpose of eliciting testimony to bear upon the point at issue. We are not prepared to say that a different rule ought not to obtain at law, where the declaration sets out a usurious contract, and that in such case a plea of usury would not be the better practice, but in equity where the party must come into court with clean hands, may not the bill be demurred to for want of equity? When the bill does not exhibit upon its face a usurious contract and does not pray for a decree for usury, the rule might be different; but even in those cases we find authorities justifying the presumption that a plea of usury would not be necessary, but in cases like the one under consideration in which the party does not abandon the usurious portion of the contract, nor bring himself within the pale of the principles of strict equity, would not a decree for usury, even where it was rendered *pro confesso* without the question of usury having been raised by demurrer, or otherwise be subject to a revisal in this court? From a careful consideration of all the authorities upon this subject within our reach, we are satisfied that this court, upon an appeal, could correct the decree of the court below.

It is now a well-settled doctrine, recognized by all the courts, that before a debtor can avail himself of the aid of a court of chancery to protect him from usury, and thereby avoid a usurious contract, he must tender to the creditor the principal and legal interest, and this is upon the principle that "he must consent to do what is just and equitable on his part, or the court will not assist him, but leave him to make his defence at law as well as he can." So, upon the other hand, we think it equally clear upon principles of equity jurisprudence, that before the creditor can obtain his decree, he must show in his bill a willingness to abandon the usurious portion of the contract, and only ask for a decree for the principal and legal interest. The converse of this would only tend to corrupt and pollute the administration of justice, and effectually prevent a

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court of equity from affording that relief which is its peculiar prerogative; upon the hypothesis then that the court would err in rendering a decree for usury, and that this court would correct the error, although the question might not have been raised below, we have no difficulty in coming to the conclusion, that when the usurious contract was made apparent by the bill, and the bill demurred to, that the court erred in rendering a decree for the usury claimed and set forth in the bill.

We have carefully examined the case of *Verner v. Dituas*, 4 Paige, 533, as also all the other authorities referred to by the counsel for appellee, in relation to the proper plea in cases of usury, and we are perfectly satisfied, that where the usury is apparent upon the face of the bill, and a decree for usury is prayed for, a demurrer to the bill will lie.

In relation to the general principles here laid down, see 5 John. Ch. R., 142, 143, 144; 2 Peters', 538; 4 Paige, Ch. R., 533; 1 Paige, Ch. R., 544; 6 Cranch., 252; 11 Wheat., 308. In the case of *Fanning v. Dunham*, 5 John. Ch. R., 141, the chancellor makes use of this significant language: "If a party, claiming under such usurious judgment or other security, resorts to this court to render his claim available, and the defendant sets up and establishes the charge of usury, the court will decide according to the letter of the statute, and deny all assistance, and set aside every security and instrument whatsoever infected with usury."

We are, therefore, of the opinion, that the court erred in overruling the defendant's demurrer, and rendering a decree for usury.

We think the plaintiff below, to avail himself of a decree, ought, in chancery, to have abandoned in his bill the usurious portion of the contract; he could then have obtained a decree for the principal and legal interest. *De Wolf v. Johnson*, 10 Wheat., 367. But, with the imperfections of the bill, the party cannot expect the aid of this court in rendering such a decree as the court below ought to have rendered.

Decree reversed.

Shuck v. Wight.

SHUCK v. WIGHT.

A usurious contract, under the statute of Iowa, is not void.

A note, payable two years after date, to bear interest at fifty per centum after due, until paid, is not usurious.

ERROR, to Louisa District Court ; under the territorial organization of the courts.

David Rorer, for the plaintiff in error.

F. Springer, for the defendant.

Opinion by WILLIAMS, C. J. Alpheus Wight, complainant, filed his bill in the district court of Louisa county. The bill states that the respondent, Shuck, executed and delivered his promissory note to the complainant, or bearer, for value received ; which note was for the sum of three hundred dollars, payable two years after date, and to bear interest at the rate of fifty per centum per annum, if not paid at maturity. That, to secure the payment of the money for which the note was given, when the same should become due, the respondent, Shuck, executed and delivered to complainant a mortgage for certain tracts of land. The note is referred to in the mortgage, and therein set forth. Both instruments are dated April 1, 1841. The mortgage describes the lands conveyed, and the condition contained therein is, that if the sum of three hundred dollars, for which the note was given, should not be paid by Shuck, or his representative, at maturity, then the interest from that time, for the money so due, was to be at the rate of fifty per centum per annum, until paid. The complainant being a non-resident, it was also made a condition in the mortgage, that if he should be absent from Wapello, where the note and mortgage were given, at the time of their maturity, a suitable person was to be by him authorized to receive the money on the day ; and if he, the complainant, failed to be present there when the note fell due, and no other person ap-

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peared to receive the money; then, Shuck might tender the money to any individual in Wapello, and if he did so the interest should be stopped, and not again begin to run until a new demand should be made by complainant for the money. Shuck also bound himself to remove no timber from the land mortgaged. It is also averred in the bill that Shuck did not pay the money when due, and refused so to do at the time of the making of the complaint.

The bill also avers that complainant, with the knowledge of respondent, duly authorized and empowered John Drake of Wapello to receive the money, when the same should become due and payable, if he the said Wight at that time should be absent from that place. That no payment of the money, or tender thereof, had ever been made to the said Drake, or himself.

The prayer in the bill is for a decree that the money shall be paid to the complainant by the respondent, together with such a sum for interest thereon as by the court should be deemed just and proper; and that the equity of redemption of the premises mortgaged should be foreclosed, and an order for the sale of the land made, to satisfy the demand of the complainant.

To this bill of the complainant the defendant demurred, and the demurrer was properly overruled by the court below. The only cause of demurrer assigned, being, that the mortgage deed was void, and of no legal effect, for the reason that it was not properly acknowledged, executed, and delivered, as required by the statute.

As the record and proceedings now appear before us, there is nothing showing what defects were alleged by respondent, to maintain and make good his demurrer. However, having examined the mortgage, as to the acknowledgment and execution, we find no good reason on which to act, and induce us to disturb the action of the court below, by which the demurrer was overruled.

The demurrer being overruled, the answer of Shuck, the respondent, was filed. By the answer, the making and delivery

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of the note and mortgage, as set forth in the bill, are admitted; but it alleges that the mortgage is not duly and legally executed. It also charges that the contract, upon which the note was given, and the money to be paid, is usurious, and also sets up fraud and circumvention in defence.

The replication of the complainant to the answer of the respondent, denies all its allegations.

The cause was tried in the district court, and a decree made for the payment of three hundred and forty-five dollars and fifty cents, with interest, at the rate of six per centum per annum, from the eleventh day of October, 1845, until paid; and for the sale of the land described in the mortgage, in satisfaction of the complainant's decree.

The only question now presented in this case, is one which has been heretofore settled, as far as principle is concerned, by the supreme court of the territory of Iowa, in proceedings at law. In the case of *Fry v. Butler and Swan*, (not yet reported,) it has been decided, that under the statute regulating interest for money to be paid on contracts, where the contract calls for a greater amount of interest than that allowed by the act of the legislature; such contract is not absolutely void, but merely voidable as to the amount of interest contracted for, over and above that which is declared legal by the act. This judgment of the supreme court is founded upon the principle, that the statute does not, in terms of absolute prohibition, forbid the making of the contract, and declare it void; but merely provides for the enforcement and infliction of a penalty for the taking and receiving of more interest than is declared by that act to be lawful.

This identical question has also been fully settled by the territorial supreme court of Iowa, in the case now at bar between these parties, in a former adjudication, by which the judgment of the district court of Louisa county was reversed, and a new trial awarded. Upon the second hearing of the cause by that court, in accordance with the ruling of the supreme court, this decree has been entered; and it is to readjudicate the case that it has been again brought to this

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tribunal. See the case in Morris, p. 425, where it was expressly decided, after a full examination of the material averments of the bill, and answer, with the exhibits, "That a note payable two years after date, to bear interest at fifty per cent. from due, until paid," is not usurious. 8 Bacon's Abt., 515, 516; Chitty on Con., p. 235.

The case on this, its second appearance in this court, was not argued by counsel, so as to bring before us any other question than the one here presented; and as we see nothing erroneous in the proceeding of the court below, the decree of the district court is affirmed with costs.

HARRINGTON v. SHARP, *Admr., &c.*

A judgment cannot operate as a lien upon a pre-emption right to land; it attaches only to the estate in fee, or by inheritance.

A judgment will not operate as a lien upon after-acquired estate, under the laws of Iowa, until a levy is made.

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ERROR, to Jackson District Court.

P. Smith, for the plaintiff in error.

James Crawford, for the defendant.

Opinion by GREENE, J. The plaintiff in error instituted an action of right against the defendants, for two lots in the town of Bellevue. The suit was dismissed, and a judgment rendered against the plaintiff for costs. The case is now in this court, by agreement of parties, on a writ of error.

The facts, as presented by agreement of the parties, show that Peter Dutell had a pre-emption right under an act of congress providing for laying off the towns of Fort Madison,

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Bellview, &c., and by virtue of that right entered the two lots in April, 1841; and in the month following conveyed them to the plaintiff.

The right of defendant is predicated on a sheriff's deed, from a judgment rendered against Dutell, in October, 1840. The levy and sale, under said judgment, were made subsequent to the transfer from Dutell to Harrington.

The only questions submitted to our determination are, will a judgment operate as a lien on a pre-emption right, and on after-acquired lands?

Under our statute, a judgment is a lien only on the "*real estate of the person*" against whom it was rendered. By the language, "*real estate of the person*," we understand, that the fee simple, or estate of inheritance, must be in the person, in order to have the judgment against him operate as a lien upon the land. A mere pre-emption right confers no such fee or estate upon a person. It is but a temporary and conditional interest, unknown to the common law. It only imparts to the pre-emptor a right over others to purchase the land within a limited period, at a stipulated price, and if he fails to pay the price within the time required, the right ceases. It is of a nature no greater than an estate for years—a mere equitable and contingent interest; and hence we are firmly of the opinion that a judgment cannot operate as a lien upon a pre-emption right to lands. See 1 Scam., 314.

Before a judgment will attach a lien upon land, the judgment debtor must have in it something more than an equitable interest: it must be an absolute estate, or a vested interest, known and acknowledged at law. *Vide Modesett et al. v. Johnson*; 2 Blackf. R., 436; 2 Cowen, 497.

As Dutell's pre-emption right to the two lots was not affected by the judgment, the question arises, would it attach as a lien upon his after-acquired title to them? The *Rev. Stat.*, p. 271, § 6, provides that "judgments in the district and supreme courts shall have the operation of, and shall be liens upon, the real estate of the person or persons against whom such judgments may be rendered, *from the day of the rendition*

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thereof." This evidently determines a lien only upon such lands as the person may own *at the time* judgment is rendered against him.

In the authorities referred to our consideration, we find ample grounds to justify the opinion, that a judgment will not operate as a lien upon property without legislative enactment; and these enactments on the subject vary very materially in different states.

In New York, by special statutory provision, a judgment is a lien upon after-acquired estate. But the laws of Pennsylvania and Ohio, on the subject of judgment liens, are very similar to ours; and in both of these states, after able and deliberate investigation, it has been decided, that when the title to real estate was acquired by the debtor after the rendition of the judgment, a lien will not attach until levy is made. *Vide* 6 Binney, R. 135-145; Walker's Intro. to Am. Law, 438; 1 Ham., 281; 2 *ib.*, 65, 224.

In the case under consideration, Dutell acquired title several months after judgment had been rendered against him; and as no levy was made upon the lots in dispute until some time after the transfer to the plaintiff was regularly made and recorded, we can entertain no doubt of his right to the premises.

Believing, then, that under our laws a judgment cannot operate as a lien upon lands acquired subsequent to the rendition thereof, except by levying thereon, we are of the opinion that the deed made by Peter Dutell to the plaintiff, Anson Harrington, conveyed the legal title to the lots in dispute, and that the sheriff's deed vested no right in the defendants. Judgment will be rendered for the plaintiff accordingly; and that of the court below reversed with costs.

Judgment reversed.

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JONES, SCOTT, AND Co. v. FENNIMORE.

By provision of the statute, after the jury have retired to agree upon their verdict it is too late for the plaintiff to claim a non-suit.

Where a verdict had been found for the defendant upon an insufficient plea in avoidance, a judgment *non obstante veredicto*, may properly be rendered for the plaintiff.

When the reasons and evidence for a new trial appear of record, and come within recognized rules of law, the question may very properly become the subject of review and correction in the supreme court.

If, by any reasonable cause, a party has been unable to present the merits of his case to the jury, a new trial should be granted to him.

The assignment of a judgment by a debtor to several creditors, as a collateral security to guaranty the payment of their demands, does not amount to an accord and satisfaction.

To constitute a legal bar to an action, the satisfaction must have been full and complete; and it should be alleged and proved that the assignment of the judgment was made and accepted in full payment of the demand, and not merely as security or contingent means of payment.

When a debtor suffers a note to remain in the hands of his creditor, and takes no receipt against it, a strong presumption is raised that it has not been satisfied.

A judgment rendered against plaintiffs in the court below, in consequence of their own mismanagement and negligence, was reversed in the supreme court at their costs.

ERROR, to Muscatine District Court.

W. G. Woodward and *S. C. Hastings*, for the plaintiffs in error. In the opening argument, the following authorities were submitted by Hastings: As to judgment, *non obstante veredicto*, &c., Stephens on Pl., 97; Chit. on Con., 767, 768, 770; 2 Gill. and John., 508. As to plaintiff's right to a voluntary non-suit, 2 Wend., 295; Graham's Pr. 310.

S. Whicher, for the defendant. 1. The plaintiff claims a reversal of the judgment, because the court refused him a non-suit. Our statute forbids it after the jury leave the box. *Rev. Stat.*, 472, § 18. In this case, it was not asked until they had returned the verdict.

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2. That the court refused a new trial. Admitting for a moment, that this court can reverse, for this cause; is there sufficient matter shown on the record, to satisfy this court that the court below erred in this? The note was settled, by giving a collateral security, with which the plaintiff rested more than four years, without any notice that the paper he received, was unproductive, or unavailing; and without an offer to return, or reassign. No authority read or cited by plaintiff, shows that a party can maintain an action, or the original consideration, without an offer to return the collateral security, if he has received any. And is it not plainly inferable from the record, that the defendant was willing to pay the whole note, if the plaintiff would cancel or reassign the judgment? What terms were alluded to by defendant, with which he required a compliance, other than a re-assignment, before he would pay? Under the circumstances of the case, made by the record, the defendant takes the ground that the jury were right in treating the negotiation of Sept. 25, 1842, as an accord and satisfaction of the note.

It is stated in 2 Greenl. Ev., § 31, that "whether an accord with a tender of satisfaction is sufficient without acceptance, is a point upon which the authorities are not agreed. It is, however, perfectly clear, that a mere agreement to accept a less sum in composition of a debt is not binding, and cannot be set up in bar of the original contract." Again, in the same section, it is said, "But whether, where the agreement is for the performance of some collateral act upon sufficient consideration, a tender of performance is equivalent to a satisfaction, seems still to be an open question, though the weight of authority is in the affirmative."

The question stated in the last extract seems so clear upon the principles of common sense, that it may well be wondered how any combination of the artificial rules of law can suggest a different result. The matter has vexed the courts of common law for centuries, yet we cannot recognize any principle, which has been clearly set forth, or steadfastly adhered to.

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The whole difficulty appears to be referable to a curious doctrine which gained favor with the courts, and is stated in *Allen v. Harris*, 1 Ld. Raym., 122. It was there held that a promise for a promise constituted a mere *nudum pactum*. In accordance with this idea, an accord without satisfaction was held bad. But the cases in which this was originally decided, though they announce the result, do not contain the reasons upon which the rule is said to be founded. One of the earliest cases is reported in 43 Edw. III., 33. That was an action of trespass, and the plea was an accord, but there was no allegation that the plaintiff had performed his part, for which reason it failed. In 16 Edw. IV., 8, Catesby contended that a plea of accord was good, and Littleton held with him. This case seems to be wholly overruled in *Robinson v. Leavitt*, 7 N. H. 73, and in *Wentz v. DeHaven*, 1 S. & R. 312. The case reported in 17 Edw. IV., 8, was an action of trespass, and a plea of tender and refusal was held bad. Of course, no tender can be made in the case of unliquidated damages. The next case is in 6 H. VII., 10. This was an action of trespass, and no tender was alleged. Consequently the plea of accord failed. These three cases of trespass are constantly cited to support the doctrine that an accord without satisfaction is no bar. But they all turn upon the well known rule that in an action *ex delicto* a tender cannot be pleaded. Yet in *Peytoe's case*, 9 Co., 77, the court saw fit to recapitulate them, and by a misconstruction of them to introduce a cardinal error into the law. *Peytoe's case* was an action of ejectment, and a question seems to have been raised in the course of the discussion, by the sergeants, which had nothing to do with the case. The question was this, "whether, if a man be bound to do any collateral act, the obligor cannot, by accord between them, give money or some other valuable thing in satisfaction, as well as where he is bound to pay money, in which case he may give a horse or any other valuable thing in satisfaction thereof?" The court, "to satisfy the said question moved amongst the sergeants," saw fit to go over the whole law of accord and satisfaction, and establish a number of principles

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which really do not result from the authorities they cite. They there enunciate the rule, which does not seem to have been ever fairly stated before, that if the thing is to be performed at a day to come, tender and refusal are not sufficient without actual satisfaction and acceptance.

The influence of this blunder may be easily traced, though it was a great while before the question came fairly before the court. In *Tassall v. Shane*, Cro. Eliz., 198, the case failed, among other things, for want of a tender. In *Case v. Barber*, Sir T. Raym., 450, the statute of frauds came in the way. *Allen v. Harris*, 1 Ld. Raym., 122, was merely a case of the liquidation of damages. In *Lynn v. Bruce*, 2 H. Black., 317, the court relied wholly upon Lord Coke. In *Ellenborough v. Thomas*, 2 Wils., 86, it was held, that there was no good satisfaction, because an equity of redemption was not the law, which is not now true.

In 1810, the whole matter came before Lord Ellenborough, at nisi prius, in the case of *Bradley v. Gregory*, 2 Camp., 385; and either because he forgot some of the earlier decisions, or because his great mind was superior to such quibbling, he took a position before unheard of. A tender had been made agreeably to the terms of a previous accord, and Lord Ellenborough held that as the defendant had done all in his power to complete the compromise, a party should not be permitted to say that there had been no satisfaction, if the satisfaction had been offered. It would be unjust.

Yet twenty-seven years after, Ch. Just. Tindal, in the C. B., reiterates the doctrines of Lord Coke, and thinks the current of authority too strong for contradiction. In the state of New York, the doctrine of Lord Ellenborough has been sustained in the case of *Coit v. Houston*, 3 Johns. Cas., 243, where the court expresses its opinion.

The second case stated in Prof. Greenleaf's work seems perfectly clear upon principle. The original compromise evidently amounts to an independent executory contract of imperfect obligations. It may certainly be decomposed into the four essential elements to which all contracts are reducible; com-

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petent parties, a subject of the contract, a consideration for it, and an actual consent. The first and most natural objection is the supposed inadequacy of the consideration. *Bayley v. Homan*, 5 Bing., 920, *Bryant v. Gale*, 5 Ver., 421; and if the agreement should be stripped of its attending circumstances, it is hardly to be supposed that any one would relinquish any part of a just claim, without a motive. But to neglect these surrounding circumstances, would be to omit the most important part of the transaction. And so says the law. Commencing with the case of *Cumber v. Wane*, 1 Strange, 425, the courts have repeatedly declared, that a security of an equal sum cannot be pleaded in an action for the larger one. All this results naturally enough from the doctrine of consideration, but it also results that the creditor may violate his promises with impunity, though freely and honestly given, and with as much solemnity as attends the ordinary transactions of life. *Brooks et al. v. White*, 2 Metc., 283. The natural influence of such a rule would be to promote bad faith in the business world, and the courts have readily seized upon any circumstances which would obviate the theoretical difficulties of extinguishing a debt by the payment of a less sum. Thus, where there is any collateral act to be performed, which may raise a technical legal consideration as against the payee, the courts have refused to apply the rule of *Cumber v. Wane*. For instance, if the smaller sum is to be paid at an earlier time, or at a more convenient place, or if a third person is to become responsible, or if it is to be paid in articles of a different nature; in all these cases, subject to a few qualifications which will be mentioned in their place, the law will protect and enforce the compromise. There is one more class of cases of a more recent date, where the ingenuity of the bench has been taxed to the utmost to overcome the technical difficulties, which are set forth in *Cumber v. Wane*. These are the bankruptcy cases, where the debtor enters into a composition with his creditors to pay a certain per centage of their respective demands, upon which he is to receive a complete release, the courts deciding that the consent of the other creditors consti-

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tutes a sufficient consideration to save these contracts from any technical objections. Such exceptions prove the narrowness of the original rule; and all must admit them to be in accordance with strict justice, and well calculated to preserve the harmony of society. And it is not a little amusing that the old judges should have attacked these compromises, quoting the maxim, "*Interest reipublicæ ut sit finis litum.*" Their advocates have since adopted the same maxim, and with far more justice.

On these grounds, we venture to lay out of the case all objections founded upon any supposed inadequacy of consideration. The next serious objection we have already alluded to by calling such compromises contracts of imperfect obligation. This objection, upon principle, is far from clear, but is, nevertheless, so well fortified by authority that it must be admitted that an accord executory is no bar. It must be executed. The rule is laid down in *Peytoe's case*, being one of the gifts of the old judges, contained in their lecture to the sergeants. It has since been generally followed, and Mr. Wallace, in his elaborate note to the case of *Cumber v. Wane*, (1 Smith's Lead. Cas. 253,) deduces it as an indispensable requisite to a good accord and satisfaction. It would be more consistent with common justice to pay more respect to promises, and to recognize the obligation of a contract operating as an accord and satisfaction, with a promise to accord at a future day, as well as of a contract for the sale of goods, with a promise to deliver at a future day. By the civil law, the obligation developed by a novation, which seems closely to resemble an accord and satisfaction, differs in regard to the necessity of execution. A novation is the substitution of a new debt for an old; but it does not follow that a new debt must be discharged before the creditor loses his remedy on the old. On the contrary, the whole debt is as completely extinguished, as it would be by an actual payment; so that (to state a strong case,) if one of several debtors, *in solido*, should contract a new engagement with the creditor, as a novation of the former debt, the former debt would be extinguished, and his co-debtors released. Poth.

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Obl. n. 563. And in a delegation, which is but another name for a novation, whereby a third person assumes the obligation of the original debtor, the discharge of the latter does not depend on the payment of the debt, by the party delegated, but is completed by the delegation, unless it is expressly stipulated that the debtor shall, at his own risk, delegate another. But these provisions are peculiar to the civil law, and we, who number the common law among our Anglo-Saxon inheritances, must take it as it is.

In the civil law, the principle is set forth in the case of the *pactum constitutæ pecuniæ*, which is a new promise to discharge a previous obligation, and the debtor, by offering to perform this promise, can be liberated from the previous obligation, *per exceptionem pacti*, as it is called. The effect of such an obligation is thus illustrated by Pothier, Obl. part ii., c. 6, sec. 9, § 4: "Suppose a person, who owes me thirty pistoles, has promised to give me six gallons of wine, of his own vintage, in payment, this pact does not destroy the former obligation. I may, by virtue of that, demand from my debtor the thirty pistoles, and my demand may, *ipso jure*, be supported; but as I have agreed, by the fact that he may pay me, instead of this sum, six gallons of his wine, he may, *per exceptionem pacti*, on offering such wine, require to be liberated from my demand of thirty pistoles; his former obligation, which was a pure and simple obligation to pay me precisely the sum of thirty pistoles, receives, by the pact, a modification, and becomes an obligation of thirty pistoles, with the power of paying the six gallons of wine in its stead."

Now, governing our case by the analogies, does it not result that every accord is a contract of which, what is technically called satisfaction, is a condition precedent—that the requisite *consensus animorum* takes place at the time of the compromise; and that, after that compromise has been effected, it is no longer discretionary with the creditor, whether he shall be bound by his promise, but he must be satisfied with a fair performance.

Why, when it is so generally admitted, in every other case

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of contract, that a tender and a refusal constitute a sufficiently good performance of a condition precedent, it should be denied in cases of accord, is difficult to perceive. The whole trouble originated in the utter inability of the old common-law judges to understand the fluctuating value of a *chose in action*. For a long time, they held that they were not assignable. Now, there are some who hold that their value is the same under all circumstances.

We are not enthusiastic admirers of the civil law, nor do we wish to do injustice to the memory of the early judges. We thought, however, that the present case might afford an amusing instance of the obstinacy with which one of the old common-law fortifications has withstood repeated attacks by the civilians and the merchants. We thought it also not a little amusing, that in constitutional England, and almost under the shadow of the parliament-house, they should have succeeded, by misrepresenting the year books to the sergeants, in ingrafting a rule upon the common-law, which exerts almost as much influence upon the transactions of daily life as any statute of the realm.

In regard to the position taken by Prof. Greenleaf, although it is so consistent with common sense, and it is to be hoped it will be adhered to in cases which may arise hereafter, it ought not, perhaps, to be said that "the weight of authority" is on that side, unless the clear and manly decision of Lord Ellenborough is thought to outweigh all the doctrines of Lord Coke and his followers.

There seems to be three classes of accords. The first includes cases of torts, in which clearly there can be no tender. The second is represented by the case of *Cumber v. Wane*, and includes those cases where there is an agreement to pay a lesser sum for a greater. In these cases, there is the technical defect of the want of consideration. The third embraces those cases, where there is some new consideration moving at the time of the accord. In these the intent governs. *Brook et al. v. White*, 2 Metc. 288.

- The ruling in Coke's Report, set up here to negative the

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idea, in a question before a jury, of an accord and satisfaction, is almost the only relic of the subtle law of his time, which has survived the inroads of the commercial system. We conclude, then, that this question being submitted to a jury, without any instruction from the court, that their decision is not only in accordance with the weight of authority, but in accordance with the enlightened spirit of the age; and the court did not err in refusing a new trial.

3. That the court refused to give a judgment *non obstante veredicto*; and to sustain this, we are referred to Stephen on Pleading, p. 97, which says: "This motion is made in cases where, after a pleading by the defendant in confession and avoidance, as, for example, a plea in bar, and issue joined thereon, and verdict found for the defendant, the plaintiff, on retrospective examination of the record, conceives that such plea was bad in substance, and might have been made the subject of demurrer on that ground. If the plea was itself substantially bad in law, of course the verdict, which merely shows it to be true in point of fact, cannot avail to entitle the defendant to judgment; while, on the other hand, the plea, being in confession and avoidance, involves a confession of the plaintiff's declaration, and shows that he was entitled to maintain his action. In such case, therefore, the court will give judgment for the plaintiff without regard to the verdict; and this, for the reason above explained, is also called a judgment as upon confession.

No case is cited, where such a motion has been sustained under the general issue.

Mr. Woodward, for the plaintiff, in reply to *Mr. Whicher*. The bill of exceptions contains and sets forth a motion for a new trial, for reason that the verdict was against the evidence, and that the verdict was unsustained by the evidence.

That evidence was, on the part of the defendant, the matter set forth in the affidavit; and on the part of the plaintiff, the fact of the possession of the note, and Fennimore's offer to pay it on certain conditions. •

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The plaintiff's debt is thrown into a precarious condition by inexperience. Justice requires a new trial, if it can be granted consistently with the rules of law; and I believe it can, with entire consistency.

Is the evidence sufficient to warrant a verdict for defendant? The affidavit says he settled the debt, &c. The word settle is ambiguous; it has many meanings. In relation to pecuniary demands, it more commonly means reduce to certainty. It sometimes means paid, but more rarely.

But its meaning here is fixed by the subsequent statement, that he settled the demand, in the following manner. Now if that following manner does not amount to a payment, then there is no payment. What was this manner? By assigning a judgment to one creditor for the benefit of several. He nowhere says it was given or taken in payment or satisfaction.

This notice amounts to a plea of accord and satisfaction, or of payment. A plea of the former kind must surely show that the thing was taken in satisfaction. And a plea of payment would have to aver that it was taken in payment or satisfaction. 3 Blackf., 355.

But farther: the assignment or transfer of a note, or other chose in action, is not a payment of a former demand, unless it be so expressly taken, and it must be so alleged. Chit. on Con., (Ed., 1842,) pp. 749, 750, *n.* (2,) 767, *n.* (1,) 772; 2 Pick., 204; 2 John., 455; 4 *ib.*, 296; 6 *ib.*, 110; 9 *ib.*, 410.

It seems to me, therefore, that neither the form nor the substance of this affidavit, and its averments, amount to a payment or satisfaction, even when taken alone.

But how much is the force of the facts in the affidavit lessened by the evidence of the plaintiff? 1. Showing possession of the note, thus manifesting clearly that it was not considered paid by the parties. 2. By Fennimore's offer to pay the note, on certain conditions, and so making it clear that he did not regard it as paid.

The court will perceive that the affidavit is not a clear, open,

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and definite statement of a payment; but an artful, carefully-drawn, ambiguous instrument.

Justice requires a new trial, that the facts of the case may be investigated. I trust the court will grant it, and we will cheerfully submit to the terms which they may prescribe.

On granting a new trial, see 1 Blackf., 229; 3 Scam., 486; 2 *ib.*, 351.

Whether a verdict is against evidence or not, is a question that cannot be raised on a bill of exceptions. *Foot v. Wisonall*, 14 John., 305; *Whiteside v. Jackson*, 1 Wend., 418; 7 Wend., 471.

The notice appended to the plea is no part of the record. *Pledgar v. Glover*, 2 Porter, 174.

The case in 14 John. is not in point. The abstract is too broad. See the opinion of the court.

The case in 7 Wend. is that the facts merely, unmingled with law, cannot be inquired into by a court on error.

But whether the verdict is against law on the facts, or whether the verdict is supported by the evidence, taking law and facts in view, is another question. See 1 U. S. Dig., 414; §§ 88, 416, 131.

Opinion by GREENE, J. Assumpsit on a promissory note. The defendant, Fennimore, proved, on the trial below, that the note and other claims against him, were settled by assigning a judgment in his favor to one Fullerton, for the benefit of certain creditors, including the plaintiffs; and that the judgment was still held and controlled by said creditors. On the contrary, the plaintiffs not only showed themselves in possession of the note; but also that, about the time suit was commenced, the defendant proposed to pay the full amount of the note, upon certain terms, which were declined by plaintiff's attorney. Upon this evidence the jury found a verdict for the defendant. After the jury had retired, and made up their verdict, and on having returned to deliver it to the court, the plaintiffs moved for a nonsuit, which was very properly overruled. The 18th section of the practice act, *Rev. Stat.*, p. 472, pro-

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vides that, "no plaintiff shall suffer a nonsuit on the trial, unless he does so before the jury retire from the bar." This, connected with the preceding portion of the section, clearly applies to the retiring of the jury to consider of their verdict. After they have made it up, and, perhaps, told the result of their deliberations to bystanders, it is too late for the plaintiff to avail himself of a nonsuit. By the common law practice, the plaintiff is entitled to a voluntary nonsuit, at any time before the jury actually deliver their verdict; but our statute limits that practice, and precludes the right after the jury retire from the bar to make up their verdict.

Motions were made for a judgment, *non obstante veredicto*; and also for a new trial, which were respectively overruled, and judgment rendered according to the verdict.

In deciding this case, it is unnecessary to enlarge upon the action of the court below, in declining to render judgment for the plaintiffs, notwithstanding the verdict of the jury. Considering the defective character of the plea in avoidance, which appears to have been set up as an accord and satisfaction of the note, such a judgment might have been rendered with propriety; but doubtless the legal rights of the parties in this case would have been better advanced by favoring the application for a new trial.

From our view of the evidence, we think there are strong, probable grounds to believe, that the merits of the case have not been fully and fairly tried; and that a complete development of all the facts may produce a very different result. The law contemplates a full hearing and a fair trial to every man; and if, by any reasonable cause, a party has been unable to present the merits of his case to the jury, it is but just that he should be granted another trial. In most cases, the question of granting a new trial is confined to the sound discretion of the court below; but still, the decision upon such a question may become the subject of review and correction in this court; especially when the reasons and evidence for a new trial appear of record, and come within the well recognized rules of law.

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In this case, the judgment referred to in the evidence appears to have been assigned for the benefit of several creditors, as a collateral security to guaranty the payment of their demands against the defendant, but not as payment or satisfaction of those demands. But the jury evidently regarded the negotiation as an accord and satisfaction of the note. Had they been instructed in the law regulating accord and satisfaction, they might not have arrived at such a conclusion, in relation to the defendant's discharge from liability.

To constitute a legal bar to an action, the satisfaction must have been full, perfect, and complete. *Clarke v. Hinsmore*, 5 New Hamp., 136; *Bump v. Phoenix*, 6 Hill, 310. It should be alleged and proved that the assignment of the judgment was made and accepted in full satisfaction of the note, and not executed merely as security or contingent means of payment. *Sinard v. Patterson*, 3 Blackf., 353; *State Bank v. Littlejohn*, 1 Dev. and Bat., 563. In the case of *Artcher v. Zeh*, 5 Hill, 200, the opinion states that "the agreement leaves it equal whether the advisement or credit was not to be the usual conditional one, to become absolute on the assigned claim proving available. Such is the legal construction of an agreement to take a claim against a third person, to be applied upon a precedent debt, and the law will not hold it to be an absolute payment, unless there be an express agreement to take it as, *per se*, a satisfaction. In the absence of such an agreement, the law will not compel the creditor to apply it in discharge, till the money be actually received." The opinion goes farther, and asserts, that even the transfer of a negotiable note against a third person would not have been a satisfaction, unless made upon terms indicating an absolute discharge or payment. But in this case there is other testimony tending to remove all reasonable doubt. The plaintiffs not only prove themselves in possession of the note, but also establish the additional evidence of indebtedness, by proving the defendant's promise to pay them the full amount of their claim upon certain conditions. Had the judgment been assigned for the purpose of paying the note, the inference is,

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that it would have been given up to the defendant for cancellation, or at least a receipt given in satisfaction of the indebtedness.

Viewing all the evidence as it appears before us, and the nature of the proceedings below, we think that justice loudly demands a new trial, and that the court erred in refusing it; but as the claim of the plaintiffs was placed in jeopardy in the court below by their own mismanagement, the costs of this court will be adjudged against them.

Judgment reversed.

WILSON v. JOHNSON.

A count for the asportation of goods may be joined with a count for trespass, *quare clausum fregit*.

Applications to amend pleadings should always be allowed when the tendency is to advance justice; and especially when the amendment contemplated is to narrow down, and not to extend the allegations.

It being a matter of discretion with the court to allow or refuse an amendment, except in cases authorized by statute, it cannot ordinarily be made the ground of error.

ERROR, to Linn District Court.

J. David, for the plaintiff in error.

Lowe and Carleton, for the defendant.

Opinion by GREENE, J. Wilson commenced this suit against the defendants before a justice of the peace in an action of trespass. The plaintiff filed with the justice, under the *Rev. Stat.*, p. 315, a plain statement of his demand or cause of action. This he did in the form of a declaration in two counts; one for breaking plaintiff's close, and the other for carrying

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away lumber. On the day set for trial, the defendants justified the trespass by a plea of title; and thereupon the justice entered the plea in his docket, ceased further proceedings in the case, and certified the same to the district court, as provided by *Rev. Stat.*, p. 319. The case came up in the district court on a motion to dismiss the suit on the ground of a misjoinder of causes of action in the plaintiff's statement or declaration; which motion was sustained by the court. To this decision of the court the plaintiff took exception, and assigned as error:

1. The court erred in dismissing the plaintiff's suit.
2. The court erred in refusing leave to plaintiff to amend the statement of his cause of action.
3. The court erred in rendering judgment against the plaintiff for costs.

The first question involved is in relation to the propriety of dismissing the suit on account of the alleged misjoinder of counts. In *Chitty's Plead.*, 201, and 2 *Saunders*, 117, the doctrine is clearly settled, that in actions "in form *ex delicto*, several distinct trespasses may be joined in the same declaration." It is evident, that a count for the asportation of goods may be joined with a count in trespass *quare clausum fregit*. See 1 *Chit. Pl.*, 410. In such an action it is usual, and recognized by the most approved precedents, to insert two counts; first, charging an injury to the land and articles thereon; and, secondly, alleging an asportation of goods. See precedents and accompanying remarks in 2 *Chit. Pl.*, 159, 863, 868. If more than a simple statement of the plaintiff's cause of action, if even a formal declaration had been required in such proceedings before a justice of the peace, the motion to dismiss on the ground alleged should not have been sustained; for we regard it as conclusive, that there is no misjoinder of counts in the plaintiff's declaration.

It may be well to briefly notice the second error assigned. The bill of exceptions shows, that when the motion to dismiss was made, the plaintiff asked leave to amend his declaration, which was refused. As the amendment sought was one which

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could not have changed the subject matter of the suit, and as it was designed to narrow down and not extend the complaint, we cannot see how it could have prejudiced the defendants. Without the amendment, the plaintiff might recover on his first count, for breaking the close, and on the second, for the asportation of lumber, whether taken from the close or elsewhere; but with the proposed amendment, the plaintiff would be confined to the proof of the asportation from the close designated. Without the amendment, the injury charged was both local and transitory; with it, local only. Had it been an amendment in substance, it still should have been allowed, though it might have entitled the defendants to a continuance of the cause. Applications to amend should always be allowed when the tendency is to advance justice; but as it is a matter usually confined to the sound discretion of the court, its determination to allow or refuse an amendment, unless authorized by statute, cannot ordinarily be assigned for error. (1)

The third error assigned must necessarily follow the fate of the first; that being deemed sufficient to reverse the proceeding below, the judgment rendered for costs cannot stand.

The judgment is reversed with costs, and the case remanded to the court below for trial.

Judgment reversed.

(1) *Stewart v. Bennett*, 1 Branch, 487; *Evans v. Rogers*, 1 Kelley, 463; *Gordon v. Downey*, 1 Gill, 41; *Ballance v. Curtenius*, 8 Gilman, 449; *Pinkston v. Taliaferro*, 9 Ala., 547. .

Holmes v. The State.

HOLMES v. THE STATE.

In an information for bastardy under the statute, it is admissible to discredit the testimony of the mother, as complaining witness, by disproving what she swore to on the preliminary examination before the justice

ERROR, to *Muscatine District Court*.

S. Whicher, for the plaintiff in error.

S. C. Hastings, for the defendant.

Opinion by GREENE, J. The proceedings in this case were commenced before a justice of the peace, under the statute providing for the support of illegitimate children. The complaint was made by Mary M. Shuly, charging John Holmes with being the father of her bastard child. On examination, the justice decided that the accused was the father of the child; but he, failing to make satisfactory compensation to the mother, and to give bond to the board of commissioners as required by law, the proceedings were certified to the district court, where he was found guilty, and judgment rendered against him.

It appears by the bill of exceptions, that on the trial the defendant proposed to prove by four witnesses, facts tending to discredit the testimony of the complaining witness, by disproving what she swore to on the preliminary examination before the justice, which proposal the court refused, and did not permit the testimony to go to the jury. Without regarding even the common law rules of evidence as bearing upon this point, it is clearly settled by the 4th section of the act upon which these proceedings were commenced. (*Rev. Stat.*, p. 200.) In relation to the evidence of the mother of the illegitimate child, it declares that "her credibility shall be left with the jury: Provided, on the trial of the issue, the jury shall, in behalf of the man accused, take into consideration any want of credibility in the mother of the child; also any variation in her

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testimony before the justice, and that before the jury, and also any other confession of hers, at any time, which does not agree with her testimony on any other plea, or process, made in behalf of such accused person." The statute evidently contemplates a full disclosure to the jury of the standing and character of the accusing witness, in order to bring all attainable light to bear upon her credibility. Truth, in such cases, can only be disclosed by a full and untrammelled investigation. The motives of peculiar interest by which the accuser is often actuated have, not unfrequently, resulted in screening the really guilty, and in punishing the innocent. Too much light cannot be thrown upon such transactions, by the discriminating test of cross-examination, and by thoroughly but relevantly disclosing circumstances bearing upon the credibility of the accusing witness. In this way the real facts in such cases can be the more conclusively ascertained, and hence our statute wisely directs such investigation. But aside from the statute, we regard it as a prevailing principle that prior contradictory evidence, or declarations of a witness, on being first interrogated in relation to them, are admissible for the purpose of discrediting his testimony. *Lamb v. Stewart*, 2 Ham. 230; 8 S. and R., 317; 2 Dev. and Bat., 244.

We can entertain no doubt, that the accused in the case at bar, was justly entitled to the evidence of those witnesses for the purpose of discrediting the testimony of the mother; and depriving him of it, was manifestly an error.

Judgment reversed.

Young v. Dugan.

YOUNG v. DUGAN.

Where the clerk of the district court omitted to make the usual indorsement on arbitration papers left with him to be filed; the testimony of one of the arbitrators is admissible to show that the award had been returned to the clerk, within the time stipulated in the arbitration agreement.

ERROR, to Dubuque District Court.

James Crawford, for the plaintiff in error.

Sanford and Smith, for the defendant.

Opinion by GREENE, J. The parties in this case submitted a matter of deference to arbitrators, under the regulations of the statute. Their agreement to arbitrate contained a stipulation to have the award made and returned to the next term thereafter of the district court, for its confirmation. It appears by the transcript of the record, that the agreement was regularly acknowledged on the 1st day of March, 1845; and that the award was concluded on the 30th day of April following. The term of the district court to which the award should have been returned, commenced on the first Monday in May, 1845. The papers and award were handed to the clerk of the district court by one of the arbitrators; but, for some reason, were not filed at the time of their reception.

The only error assigned is, that no award was made or returned within the time limited in the agreement of submission. By the affidavit of Warner Lewis, Esq., it appears that he, as one of the arbitrators, handed the award to the clerk of the district court the next day, as he believes, after the decision of the arbitrators.

This evidence, in connection with the presumption that the proceedings were regular and according to the terms of the submission until the contrary appears, confirms our opinion, that the court below did not err in receiving and acting upon the award.

Judgment affirmed.

Mattoon v. Burge. Reed v. Hubbard.

MATTOON v. BURGE.

An execution and returns copied into a transcript are no part of the record, unless made so in some manner known to the law.

ERROR, to *Muscatine District Court*.

Per curiam. In this case the defendant moves to dismiss the writ of error, and quash the returns, for the reason that the matters therein are not properly of record.

We regard all as properly of record in the transcript, excepting the execution and returns thereon. These, not having been made of record in any manner known to the law, they will be stricken from the transcript.

REED v. HUBBARD.

In order to bring papers, used on the trial below, before the supreme court, as a part of the record, they should be incorporated into the bill of exceptions, or plainly identified thereby.

ERROR, to *Scott District Court*.

R. P. Lowe, for the plaintiff in error.

E. Cook, for the defendant.

Opinion by GREENE, J. This case comes before us on defendant's motion to strike from the record the bill of exceptions, because it refers to certain papers which are not copied therein, and without which no question is raised for this court.

The bill of exceptions refers to certain papers, in the following manner: "the plaintiff then exhibited his bill of particulars, marked A, (here insert the same.*)" And again it refers to a "contract marked B," without setting forth the

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bill of particulars, and the contract, or in any way identifying them. In order to make these papers a part of the record, they should have been incorporated in the bill of exceptions; or, at least, so identified therein that they could not be mistaken. As it is, we have nothing before us by which the papers referred to can be properly identified. The practice appears to be well settled, that in all cases where a written instrument is referred to, as connected with the action of the court, to which exception is taken, it should be contained in the bill of exceptions. See *Morris*, 364, 439, 443; 3 *Scam.*, 185, 260; 4 *ib.*, 34, 420.

The motion, to strike from the record the bill of exceptions in this case, is granted.

MILLER v. HARDACRE.

A judgment by *nil dicit* cannot be rendered when there is a plea of general issue on file in the case, unless the plea is expressly or tacitly withdrawn; and such withdrawal will be presumed, if it appears by the record that defendant's counsel was in court at the time judgment was rendered against his client, and made no objection.

ERROR, to Cedar District Court.

John P. Cook, for the plaintiff in error. This was an action of assumpsit, brought by Hardacre against Miller, in the district court, Cedar county, returnable to September term, 1846. The presiding judge failing to hold a term in September, this cause, among others, stood continued until the May term, 1847.

On the first day of May term, the defendant below, by Cook, his attorney, filed a plea of the general issue; and on the 20th of said May the plaintiff took judgment by *nil dicit*, for want of a plea; as will be seen by the record, and the clerk assessed

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the damages; in this the court erred. The cause should have been tried by a jury. The court below could not enter judgment by default, when the plea of the general issue was pending and undetermined. *Davis v. Brady*, Morris, 101.

S. C. Hastings, for the defendant. The judgment is by *nil dicit*, and not by default. So the case of *Davis v. Brady* is not pertinent; that being a judgment by default.

The record shows that defendant below was in court with the plea of non-assumpsit, and permitted judgment to be rendered by *nil dicit*, the defendants below refusing to insist on or urge their pleas. The plaintiff in error should affirmatively show that his plea was not withdrawn.

The judgment was rendered on promissory notes, and it was not necessary to call a jury to assess damages.

A judgment by *nil dicit* implies a withdrawal of pleas.

See the case of *Coutch and Kinsman*, Morris, 355.

J. P. Cook, in reply to Mr. Hastings. The case cited by defendant in error is not analogous to this case.

There, the defendant interposed a demurrer to plaintiff's declaration, which was filed with other pleas: The record does not show that the demurrer was called up, consequently it is to be presumed that the defendant waived his demurrer and went to trial on his other pleas: whereas in this case the general issue was filed, and the entry of the judgment says that "the defendant failing to plead, judgment by *nil dicit*," &c. Now this is nothing more nor less than a default, and the effect upon the plaintiff in error amounts to that; for the judgment is entered for want of a plea, when the record shows the plea to have been filed the first day of the term; and it is too well settled that no such judgment can be entered until the plea is in some way disposed of.

Opinion by GREENE, J. This was an action of assumpsit, in which judgment was rendered by *nil dicit*. It is claimed that the court erred in rendering such a judgment after a plea

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of general issue had been filed. Certainly if such a plea was pending before the court, it was grossly erroneous to render a judgment by *nil dicit*; for the very character of the judgment implies a failure to plead. It appears by the transcript of the record that a plea was filed; but it does not appear to have been called up for the action of the court. In the case of *Coutch and Kinsman v. Barton*, Morris, 354, it was decided that it is the duty of the court to entertain such questions only as are called up for action. Still it may well be assumed that when a plea is properly filed in a case the court should recognize it. But the mere filing of a plea, without notice, reference, or attention to it by the pleader, is not sufficient to bring the matter within the cognizance of the court, especially when the party is in court at the rendition of the judgment and makes no objection. Indeed, such conduct would imply an abandonment of the plea. And we have, in this case, an authentic reason to infer an abandonment or withdrawal of the plea. In the judgment of the court, it is averred, that the parties appeared by their attorneys, and that the defendant failed to plead. Thus it appears that the defendant's counsel was present, and by his silence, at least acquiesced in the proceedings of the court; and in its decision that there was a failure to plead. Had not the record shown that defendant's counsel was present when judgment was rendered, and failed to plead, it appearing by the transcript that there had been a plea previously filed, we should have been under the necessity of reversing the judgment. But the facts stated in the record entry of the judgment, under the particular supervision of the court, we must regard as paramount to the plea copied into the transcript.

Generally, as a matter of wise precaution, it would be well for the district judges to inquire particularly into the state of pleadings before rendering a judgment by *nil dicit*. Under the circumstances of this case, and the judgment appearing to have been justly entered upon a plain note of hand, it must be affirmed.

Judgment affirmed.

Mackemer v. Benner.

MACKEMER v. BENNER.

Unless the errors assigned appear affirmatively of record, it will be presumed that the proceedings below were correct.

A judgment will not be reversed for trivial causes, not affecting the rights of parties, or the established rules of practice.

ERROR, to Muscatine District Court.

This was an action of assumpsit, commenced in the district court, on a promissory note. Judgment for the plaintiff. A full statement of the case, to understand the points decided, is not necessary.

S. C. Hastings, for the plaintiff in error.

S. Whicher, for the defendant.

Opinion by GREENE, J. There are several errors assigned in this case; but those of a material character are not disclosed by the transcript of the record. It has often been decided by this court, that no error can be assumed from mere omission or defect in the transcript; that it must appear affirmatively of record. Unless it does so appear the presumption of law is, that the proceedings in the court below were legal and proper.

Nor will we disturb the judgment of the district court for light and trivial causes, not affecting the rights of parties, nor materially disturbing established rules of practice, as recognized by this court.

Judgment affirmed.

Dollarhide v. Muscatine Co.

DOLLARHIDE *et al.* v. BD. OF COM. OF MUSCATINE CO.

The official certificate, or the testimony of the officer who administered the oath required by law to road viewers, is more authentic than the mere statement in the report of such viewers, that they had been duly sworn. It will be presumed that a person in authority has done his duty until the contrary appears.

The acts of road viewers are not void, if they omit to state in their report, that they had been duly sworn; such a statement is not required.

ERROR, to Muscatine District Court.

S. C. Hastings, for the plaintiff in error.

W. G. Woodward, for the defendant.

Opinion by GREENE, J. This was a proceeding before the board of commissioners, of the county of Muscatine, relative to laying out and establishing a road. For the purpose of reversing the order of the commissioners, declaring a certain road to be established, an appeal was taken to the district court, where a motion made to dismiss the appeal was overruled, and a judgment of affirmance rendered.

By the bill of exceptions, it appears that the appellant offered to prove that the reviewers of the road in controversy were sworn according to the requirements of the statute; but the court decided no evidence admissible, but the report of the reviewers to the commissioners; and also that even if they were sworn according to law, but failed to report the fact, their acts would be null and void. We think this ruling of the court erroneous. Evidence of the fact, that the reviewers were sworn before entering upon the discharge of their duties, might come from a much more conclusive and reliable source than their own report. The certificate or testimony of the officer administering the oath would unquestionably be better and more reliable evidence in such a case, even if the reviewers had stated in their report, that they had been duly sworn. Such a statement might be regarded as *prima facie* evidence of the fact; but could by no means be considered as conclu-

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sive. And even without such a statement the law would presume, in the absence of proof, that they had qualified themselves for the duties assigned them by their appointment. The principle is well recognized, that when a person in authority is required to do a certain act, which could not be omitted without a neglect of duty, the performance of it will be presumed, unless the contrary is proved. *Hartwell v. Root*, 19 John. 345. *Mussey v. White*, 3 Greenl., 290. And in *Kelly v. Connell*, 3 Dana, 532, a case of arbitration, in which there was but little progress in the trial, and no award made or other proof, that the arbitrators were sworn; it was held that the presumption is, that they were duly qualified, and that what was testified before them by a witness, since deceased, might be proved on another trial, in relation to the same matter. If presumption of qualification is admissible under such circumstances, can its propriety be questioned in this case? The appointment of the reviewers, their decision as to the utility of the road, and their final report were complete; how much stronger then, and appropriate the presumption, that they took the requisite oath.

The court as evidently erred in deciding, that their acts were void, merely because the fact of their having been sworn was not announced in their report. By the statute they are only required to report "their opinion in favor, or against the establishment of the road, and their reasons for the same." *Rev. Stat.*, p. 521, § 5. They are not required to state that they had been duly sworn, nor is it usual for an officer or agent to make formal report of that fact. Such a thing being unrequired and unusual, it is difficult to conceive how the omission of it should operate to render other proceedings nugatory. *Williams v. Eldridge*, 1 Hill, 252. Having taken the requisite oath, their qualifications for action as viewers were complete; and merely leaving out of their report the fact of their having been sworn, could not invalidate their proceedings. The judgment is therefore reversed, and the cause remanded.

Judgment reversed.

The State v. Newton.

THE STATE v. NEWTON.

In an indictment for perjury committed before a justice of the peace, it is sufficient to aver, in relation to jurisdiction, that it was at a justice's court, held at the proper time and place, on an issue duly joined in his court, in a cause which came on to be tried in due form of law, and that the justice had sufficient authority to administer an oath; without alleging that the case, in which the perjury is charged to have been committed, was within the jurisdiction of the justice.

ERROR, to Johnson District Court.

The indictment in this case was found in the district court of Cedar county, and the venue was changed to Johnson county. The statement of the case, like most of the others reported, is sufficiently set forth in the opinion of the court.

John P. Cook, prosecuting attorney, for the state. This cause came on to be heard below upon motion of defendant to quash the indictment, for the reason that there was no averment in the indictment that the justice of the peace, before whom the perjury is alleged to have been committed, had jurisdiction of the matter then tried before him. This is the only question in the cause. We say, the court below erred in quashing the indictment and discharging the defendant. The prosecution was not bound to aver that the justice had jurisdiction. The court are bound to presume it. 6 Iredell, N. C., 9; 2 U. S. Dig., 521, refers to 5 Wend., 9; 3 U. S. Dig., 132, refers to 12 Mass., 274; 2 Russell on Crimes, 517, note (A); *Rev. Stat.*, 153, § 46; *ib.* 156, §§ 71, 72.

R. P. Lowe, for the defendant. It is not necessary for us to contend that, in an indictment for perjury, committed in the district courts of this state, it should be averred in the indictment that the court trying the cause where the perjury was committed had jurisdiction of such cause, because such court

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has general and original jurisdiction; but our magistrates' courts possess limited and special jurisdiction, circumscribed as to territory over which they preside, and restricted as to the amount they may adjudicate. If in either of these particulars they exceed their jurisdiction, their proceedings are void. If a man swear falsely in a cause, before a magistrate, over which he has no jurisdiction, it would not be perjury in law; for the whole proceeding would be a nullity.

In this case the court below quashed the indictment, because it did not aver that the magistrate had jurisdiction of the cause, in the trial of which the perjury is alleged to have been committed; and in this we say the court did not err. The doctrine in criminal pleading is well settled, that the indictment must set forth all the facts and circumstances, essential to show that an offense had been committed, in cases of perjury before magistrates. This is especially true, on account of their possessing limited and special jurisdiction. Without jurisdiction their proceeding would be extra-judicial. Upon their jurisdiction would depend the question whether perjury had been committed or not; hence jurisdiction is a fact which should be averred, and appear affirmatively in the indictment. See 9 Cowen, 30, 31; 3 John. Dig., 558; 12 Wend., 38.

The same thing has frequently been decided in New York, in action for slanders; if necessary in civil procedure, *a fortiori*, it would be in a criminal proceeding where the pleadings are always taken most strongly against the government. The question for decision in this case commences and ends with a principle of elementary pleading, and does not need further enlargement. The indictment shows rather a want of jurisdiction, than that the magistrate had jurisdiction of the cause in the trial of which the supposed perjury was committed.

Opinion by GREENE, J. Indictment for perjury. A motion was made to quash the indictment, because it does not allege that the case in which the perjury is charged to have been committed, was within the jurisdiction of the justice before whom

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the trial was had. The motion having been granted by the court below, the case is brought here to reverse that decision. This is the only ground of error involved. It is conceded that, in every other particular, the indictment is sufficient. Upon the point of jurisdiction, it charges that, "at a justice's court, held by William Hock, Esq., a justice of the peace in and for the county of Cedar and state of Iowa, on the twenty-first day of December, one thousand eight hundred and forty-six, a certain issue was duly joined in said court, between one James Dunn, plaintiff, and Timothy J. Newton, defendant, in a certain action of assumpsit, &c., which said issue came on to be tried before said court, &c., and that on the trial of said issue the aforesaid Timothy J. Newton did then and there, &c., appear, and was produced as a witness for and on behalf of the said James Dunn, and was then and there duly sworn, &c., which aforesaid justice and court then and there had sufficient and competent authority to administer said oath," &c. The indictment charges the various points of perjury with much particularity and precision; but does not, in form, aver that the justice's court had jurisdiction of the cause in which the oath was made.

Under the statute of 5 Elizabeth, c. 9, indictments for perjury were necessarily prepared with great prolixity, precision, and technicality. But frequent failures of prosecutions, in consequence of mere formal defects, induced a relaxation of those stringent rules, and brought about a more liberal and reasonable practice. By enactment of 23 Geo. II., it was declared to be sufficient for an indictment for perjury to set forth the substance of the offense; by what court the oath was administered; averring such court to have competent authority to administer the same, and the usual assignment of perjury, or denial of the defendant's oath; without setting forth in particular detail the proceedings of the trial in which the alleged perjury was committed. The spirit of this statute has been either re-enacted or adopted in practice by most of the states in this country. Though it has been decided in one or two states, that an indictment for perjury should distinctly and

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clearly set forth the facts, which show that the alleged false oath was taken in a judicial proceeding before a court of competent jurisdiction. *State v Gallimore*, 2 Iredell, N. C., 374. But, in a more recent decision, the same rigor has not been required. 6 Iredell, 9. In the case of *Commonwealth v. Knight*, 12 Mass. 275, it was decided to be unnecessary and unusual to aver in an indictment for perjury, that the justice before whom the oath was taken had jurisdiction of the case; that it is sufficient to aver, that an issue was duly joined in his court, and it came on to be tried in due form of law; and that he had competent authority to administer the oath in question. It must be apparent that the indictment in this case comes up fully to these requirements. This authority is so conclusively to the point, so well sustained by reason and policy, that it may be considered unnecessary to make farther reference or comment.

It has also been decided in New York, that in an indictment for perjury, it is not necessary to set forth the facts which give jurisdiction to the court or officer trying the case; and that it is enough to aver that he had lawful authority to administer the oath. *People v. Phelps*, 5 Wend., 9. And in Wharton's Am. Crl. Law, 474, we find that such an indictment need not show the nature of the authority of the party administering the oath. Thus showing, that a general averment of authority to do so, is all that should be required. Also in the case of *Respublica v. Newell*, 3 Yates, 407, it was decided that an indictment is sufficiently certain in averring that the party was sworn in due form of law. And in Russell on Cr., 517 n. (A), it is stated, "we find it laid down by the judges, that an indictment for perjury at common law does not require so much certainty as on the statute, and that it need not be in a court of record;" and cites 5 Mod., 348; 1 Sid., 106. The statute here referred to, is that of 5 Elizabeth; and the enactment of 23 George II. substantially adopted the common law regulations. Still, viewing this case upon common law principles alone, it must be conceded that the authorities which we have examined, as bearing upon this question, do

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not altogether harmonize in supporting the sufficiency of the indictment; yet we think that a decided preponderance determines its correctness, both in form and substance. But, independent of common law regulations, the accuracy of the indictment is established beyond all doubt, by recurring to the 32nd section of the act defining crimes and punishments. *Rev. Stat.*, p. 171. It declares, "that in every indictment for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and before what court or authority the oath or affirmation was taken, averring such court or authority to have full power to administer the same," &c. A decision under a similar statute may be found in *Halleck v. State*, 11 Ohio, 400.

The court having erred in quashing the indictment, the judgment is reversed, with costs, and the cause remanded.

Judgment reversed.

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In computing the time of serving process before the return day, the day of service should be included, and the day of return excluded.

ERROR, to *Muscatine District Court*.

R. P. Lowe, for the plaintiff in error.

S. C. Hastings, for the defendant.

Opinion by GREENE, J. This case was originally tried before a justice of the peace; and removed to the district court by a writ of *certiorari*. The *certiorari* was dismissed on motion. One reason assigned in the motion to dismiss is, that no error

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appears in the judgment of the justice. This brought the case before the district court upon its merits, and called for a judgment as the right of the matter appeared. The errors assigned in this court refer mostly to the proceedings before the justice. The only one which it is necessary for us to notice is, "that the attachment was returnable less than seven days from the issuing of the same." The transcript shows that the writ of attachment was issued on the 9th and made returnable on the 16th of the same month; making the time but six days, if the issuing and return days should both be excluded. But it has been decided, at the present term of this court, that in computing time, in such cases, it is proper, and by courts, a generally recognized rule, to include the day of service, and exclude the return day. In the case before us, under this rule, there were seven days from the issuing to the time the writ was made returnable. We can see no reason, in this or in the other alleged errors, to disturb the judgment of the court below.

Judgment affirmed.

SAUM v. Bd. of Coms. of Jones Co.

The supreme court will entertain no error that does not appear affirmatively of record.

A plea in abatement for misnomer should be verified by affidavit.

When pleas are filed to the general issue, and in abatement at the same time, and issue is joined upon the former, and the cause thereon submitted to the court by consent, but no action had upon the plea in abatement not properly verified, it will be presumed that it was not received, or was waived and abandoned.

A note was given for a lot in the town of Newport, while it was the seat of justice for Jones county. Shortly after, a law was passed, authorizing the legal voters of the county to establish the county seat, and it was accordingly removed to the town of Lexington, whereby the lot in question

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was rendered comparatively valueless. To show that the consideration of the note had entirely failed, these facts were specially pleaded. Held that the plea was demurrable; that the facts show nothing inconsistent with good faith and fair dealing on the part of the defendant, as he could not be held responsible for the subsequent act of the general assembly and the vote of the people; and that the right of removing seats of justice is an attribute of the law-making power; and whoever buys lots in such a place, does so subject to the exercise of that power, and to the contingency of a change in the location.

When it appears by the record that the cause was submitted to the court by consent of parties, it will be presumed that the right of trial by jury was waived.

ERROR, to Jones District Court.

John P. Cook, for the plaintiff in error. The first reason assigned for error in this cause, is the overruling the plea in abatement of defendant below. It will be seen that the suit is brought in the name of "the board of commissioners of Jones county;" that the writ commands the sheriff to summon to answer unto the board of commissioners of said county. That the note, which was made a part of the declaration below, is payable to the board of county commissioners, without stating of what county, or any thing by which the court could infer it. Our *Rev. Stat.*, 123, creates the board of commissioners in each county by the corporate style of "The Board of Commissioners of the County of —," and provides, they may sue and be sued by that name, and we undertake to say, that any variation in setting out their corporate name is fatal. See 7 Blackf., p. 37. On examination of the record, it will be found that the true style of the board, is not set out in a single instance.

The second error assigned is, that the court below erred in sustaining plaintiff's demurrer to defendant's third plea. This plea goes to the consideration of the note, without giving the substance of it. We insist that this plea is well taken. Suppose the note had been given to an individual under the same circumstances, and by his own subsequent act he had taken away, or removed the real inducement for which the note was

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given, and thereby rendered valueless the property purchased, and for which the note was given; would it be contended for a moment that the maker of the note could not set up a plea of failure of consideration? We apprehend not. Then why is the rule not equally applicable in this case? This note is made payable to the commissioners, for the benefit of the people of the county, and they, by their own act, take away the entire consideration. There can be no good reason, then, why they should be placed in a different situation from an individual.

When a county seat is located, and inducements are held out to purchasers to buy their lots, those who purchase do it upon the faith of the county, and if the people of the county subsequently betray the confidence of the purchaser, they are responsible for it.

W. G. Woodward, for the defendant. The plaintiff in error pleaded in abatement to the writ and declaration. Of the writ he does not crave *oyer*, and make it part of the record. According to the settled doctrine, it is not part of the record, unless made so. *Childs v. Risk*, Morris, 439. Besides this, it is good enough.

Then to the declaration. The plaintiff sued by the name of "The Board of Commissioners, of Jones County." The corporate name is, with this difference, "commissioners of the county of Jones." Is it not near enough? "Of Jones county," instead of, "of the county of Jones," is the error or variance complained of. An exactly like case in Muscatine county was held sufficient by the former presiding judge of that county, and I think rightly.

Again, the pleader says the said plaintiffs, to wit, "the said board of commissioners, of Jones county." The new plaintiffs are known in their corporate capacity, as "the board of commissioners, of the county of Jones;" without this, that the said, "the board of commissioners, of Jones county," the now plaintiffs are known by the name of "the board of commissioners, of the county of Jones," as in and by the said writ and declaration appears.

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Now here, he is self-contradictory. He recognizes them by the name in which they have sued; and then he denies that they are known by their corporate name. The plea is bad, and demurrable.

In his argument, the defendant speaks of the form of the note. This is an objection to be taken on the trial, when the note is offered in evidence. Not being done then, the objection is gone. It is not the subject of a plea in abatement.

The second error assigned is to the decision sustaining the plaintiff's demurrer to defendant's third plea. When a person buys a lot in a town, even though it be a county seat, he buys subject to all the common contingencies. He knows that a county seat may be changed by law; and what though a law authorizes a change? Can he plead it as a failure of consideration? It is the act of the law, and he is virtually one of the law makers—it may be, one of the people who voted for the change.

Opinion by HASTINGS, C. J. This was an action brought in the Jones county district court, at the September term, 1847, by the defendant in error, on a promissory note drawn by the plaintiff.

The defendant below filed his plea of abatement on the 28th of September, for misnomer; and simultaneously therewith his three special pleas, and the plea of the general issue.

No issue was taken on the plea of abatement. Issue was joined on the first and second pleas, and also on the plea of the general issue; and to the third special plea the plaintiff below demurred, and the plaintiff in error brings this case to this court, and assigns the following errors:

- I. The court erred in overruling the plea in abatement.
- II. The court below should have sustained the plea in abatement.
- III. The court erred in sustaining the demurrer of plaintiff below, to defendant's third plea.
- IV. The court should have overruled the plaintiff's demurrer to defendant's third plea.

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The first and second errors are in substance the same; as well as the third and fourth.

The record in this case is very defective, and appears to be composed in part of the original papers, and in part of what appears to be a transcript from the record.

It does not appear of record what disposition was made of the plea in abatement; whether the plea was overruled, rejected, or abandoned.

Errors must affirmatively appear on the record, or they cannot be noticed by this court.

It does not appear that the plea in abatement was verified by affidavit of the truth thereof, as is required by the statute relative to pleas in abatement; and this being a plea in abatement for misnomer, it was necessary that the same should be so verified, or that the affidavit should be waived. True, it appears at the foot of the plea, that the pleader had inserted the words, "oath waived;" but it does not appear that the defendants or their attorneys waived the oath.

The statute above referred to is as follows, viz.: "That no plea in abatement, other than a plea of the jurisdiction of the court, or where the truth of such plea appears of record, shall be admitted or received," &c. *Rev. Stat.*, p. 47, § 1.

Inasmuch as the court had no action on the plea, and the plaintiff below did not respond to the same, and issue was joined on other pleas, and the cause submitted to the court by consent of parties, we presume the plea in abatement was not received, or was waived and abandoned, which disposes of the first two errors assigned.

As to the third and fourth, it appears that the defendant below set out in his said third special plea, "that said supposed promissory note was made and executed by said defendant to said plaintiff, for a certain town lot, in the town of Newport, in the county of Jones, and state of Iowa, viz.: Lot four, in block one; and then, to wit, at the date of said note the seat of justice for said county; and for no other consideration. That the only value of said town lot consisted in Newport remaining the seat of justice of said county, without which it was valueless.

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That afterwards, by an act of the general assembly of the state of Iowa, entitled an act to "provide for the location of the county seat in the county of Jones, and approved the third February, 1847, the legal voters of said county, by a vote in accordance with the said provisions of said act, removed said seat of justice from said town of Newport to the town of Lexington, in said county; at which latter place the seat of justice for said county is located;" and thereupon claims that the consideration of the said note has wholly failed. To this plea the plaintiffs below filed their general demurrer, which was sustained by the court; and the question is, did the court err in sustaining said demurrer? We think not. The existence and truth of the facts stated in said plea, are not inconsistent with good faith and fair dealing on the part of the defendant in error, in selling said lot to the plaintiff in error.

The defendants are not to be holden responsible for the subsequent act of the general assembly, nor for the votes of the people in removing the seat of justice. The right to remove seats of justice is an attribute of the law-making power; and no individual or individuals ought to be held responsible for the evils accruing from the exercise of such right.

He who purchases a town lot at a county seat, (whatever may have been his opinion of the length of time that such town should remain the seat of justice,) purchases subject to all the future contingencies of removal.

It is not averred in this plea that the defendant made false representations, or held out false inducements to plaintiff in error, in making the sale of said lot; but it is only averred that they sold the said lot, it then being in a town which was the seat of justice, and that afterwards another power and other persons, for whose acts the county is not responsible, caused the seat of justice to be re-located.

As to the issues joined between the parties, on the first and second special pleas, and on the plea of the general issue, it does not appear that a jury was called; but, from a favorable construction of the record, we must infer that a jury was waived, and inasmuch as the plaintiff did not assign for error the fact

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that no jury was called to try said issues, and from the following language in the record, viz.: "And this day came the parties in this cause by their attorneys; an issue is made to the court, on law and fact, by consent of parties." We infer that a jury was waived, and that the issues of fact were tried by the court, as well as the issues at law.

Judgment affirmed.

CARTER *et al.* v. CAVENAUUGH.

The general character and standing of a witness, as a good or bad man, without reference to his character for truth, is not admissible for the purpose of impeaching him.

In an effort to impeach a witness, the proper inquiry is as to his general reputation for veracity, where he is best known.

ERROR, to Clayton District Court.

T. Davis, for the plaintiff in error. The only question in this case is, whether a witness may be impeached by showing a general bad character, and not by confining the inquiry as to his character for truth and veracity.

In this case, it was proposed by the plaintiffs in error, to prove that a witness, examined by defendant in error, was of general bad character. The court refused to permit this inquiry, and restricted the inquiry as to the character of witness for truth and veracity.

This restriction, it is insisted, was erroneous. In support of this position, see Cowen and Hill's Notes, pp. 767, 768, and 769; Note 538, 1 Greenl. Ev. § 461, and note.

It is remarked by the author in the note, that in the northern states the inquiry is confined to character for truth and veracity, but does not cite authority. Cowen and Hill's Notes above show this a mistake, and the authorities are cited, showing a different practice in the northern states.

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This question is so fully discussed in the authorities cited, that no attempt will be made to add to their fullness.

P. Smith, for the defendant. By the bill of exceptions, it appears that plaintiff in error made a qualified offer to show bad character of one of our witnesses; but, as it appears, it was made with a proviso that nothing could be said of the character of the witness as to truth and veracity. This proposition goes far beyond any thing to be found in the books; all authorities agree that the character for truth and veracity is proper, but the courts in N. C. and Ky. have decided that a party may go farther, and show general bad character. 1 Greenl. Ev., § 461. But in England, and the northern states of our union, the rule is confined to truth and veracity. The proposition in this case proposes to reverse the rule, and to confine the inquiry to general character, excluding character for truth; and the court ruled out the proposed testimony as improper, in the particular manner in which it was offered. There is no authority going so far as the counsel for plaintiff proposed, and the rule extending the inquiry to general character is confined to two or three states.

Opinion by GREENE, J. The defendants in the court below were found guilty in an action of trespass *quare clausum fregit*. On the trial, a witness gave material testimony in behalf of the plaintiff; and for the purpose of impeaching him, several witnesses were called by the defendants, who proposed interrogating them as to the general character and standing of the witness as a good or bad man, without reference to his character for truth. To this general method of impeachment, regardless of character for veracity, the plaintiff objected; and the objection was sustained by the court.

The numerous authorities upon the subject of interrogating an impeaching witness, are far from being harmonious. All agree, however, that the inquiry must be as to general reputation, extending to public opinion, either as to character for veracity or character for morality in general.

Courts of high standing have decided, that the inquiry may

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be, as to the general moral character of the witness, for the purpose of impeaching him. In the case of *Hume v. Scott*, 3 Marsh., 260, the question, "What is the general moral character of the witness?" was held to be correct, and that the jury might draw unfavorable inferences as to the veracity of the witness from his moral depravity. This is the strongest case we have met with in support of this more general and unrestrained method of impeaching a witness. In *The State v. Boswell*, 2 Dev., 209, it was decided that the witness may be proved to be of bad moral character; either with or without restricting the inquiry as to his veracity. And in the case of *The People v. Herrick*, 13 John., 84, it is assumed that the conviction of a crime such as petit larceny would as much destroy the credibility of a witness as if it related to his truth. In 1 Hill, N. C. Rep., 251, 258, and 1 Hall, 558, the rule of restraining the inquiry to general character for truth appears to be regarded as too contracted. That position is also sustained by the case of *The State v. Sterlings*, 2 Haywood, 300. Also, *Noel v. Dickey*, 3 Bibb., 268; *Blue v. Kirby*, 1 Monroe, 195.

Imposing as are those authorities in respectability and numbers, we by no means regard them as conclusive, nor as preponderating over those which favor the limitation to inquiries of general character for truth. The method of questioning as to general character alone, appears to us, not only vague, but subject to great abuse and injustice. Clanish witnesses, whose intercourse and business are limited to a particular class of kindred spirits, who may constitute a majority of the neighborhood, often entertain peculiar and contracted views of general character, when applied to those who may not agree with them in social, religious, or political tenets. And thus, by a decided majority of one neighborhood, a man might be represented as possessing an excellent general character; while in an adjoining neighborhood, where equally well known, he might be described as a man of great moral turpitude. Observing men in our own and in the adjoining states, must have seen this neighborhood prejudice against individuals frequently illustrated, and carried to very unjust and pernicious extremes.

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Take a community of Mormons, and an adjoining one of anti-Mormons. A person known and observed alike by both communities, would likely be regarded by the one whose views he favored and advocated, as a man of moral worth; but by the other, as depraved and bad. Indeed, wherever religious enthusiasm rages and encounters opposition, we see these conflicting views of general good or bad character signally exemplified. But confine the inquiry to its legitimate object—to a specific and definite point, and then, even under such influences, the truth may be attained. Even where fanaticism or political animosity abounds, a man may be regarded and represented as a bad character, and still recognized as worthy of credit under the solemnities and responsibilities of an oath. The requisites of a good character, and the components of a bad one, are so variously viewed by different, and even adjacent communities, that they never can become a safe and uniform test of veracity, without confining the inquiry particularly to character for truth. In some communities an ultra-mason, in others a proscriptive anti-mason; in this neighborhood an abolitionist, in the adjoining one an anti-abolitionist, would be regarded and styled a bad character; and thus, in many communities, he who plays cards, or engages in horse-racing, or frequents groceries, or works on the sabbath-day, is looked upon and called a bad character; and yet such men—either the advocates of unpopular sentiments, or those addicted to objectionable habits—may have a most commendable regard for veracity. Man is so constituted, that in the observance of some virtues he may be weak and unreliable, while in others he may be strong and exemplary. There is, perhaps, no maxim better established on truth than that, “all men have their failings.” All fall into some vice of omission or commission; while many commit offences of a grave and reprehensible character. A man of strict truthfulness and of unblemished integrity in all business relations, may perpetrate many things which would give him the general reputation of a bad man; another may have a bad character as a business man, and still retain a most tenacious reverence for truth; and a

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third might have a propensity for lying, and even perjury, regarding them as trivial vices, while he would eschew offenses of much less turpitude.

Though true it is, that to be honorable, a man must be strictly honest; still, he may be honest without being honorable. Honesty is limited to pecuniary dealings, but honor extends to the sentiments of the heart and to general deportment. The honest man will pay all, and defraud no one; but still, in many instances, he may act and feel dishonorably. So, too, a man may possess the utmost veracity and truthfulness, and still have the general character of a bad man in community, for vices perfectly compatible with a proper regard for the solemnity and obligation of an oath. And thus, by opening this boundless field of inquiry as to "bad character" in its multitudinous phases, the most truth-abiding men might often be impeached.

The term "bad character," applied to man or woman, is used, by very common acceptance, to designate loose, immoral, or lascivious deportment; but who, properly regarding the weight of authorities, will contend that proof of such deportment is admissible to impeach a witness? It is true, that in the case of *The Commonwealth v. Murphy*, 14 Mass., 387, it was held, that a witness might be impeached by showing her to be a common prostitute; but this principle was distinctly overruled in the following cases: *The Commonwealth v. Moore*, 8 Pick., 194; *Jackson v. Lewis*, 13 Johns. 504; *Gilchrist v. M'Kee*, 4 Watts, 380; *Wilds v. Blanchard*, 7 Verm. 141; *Bake-man v. Rose*, 14 Wend. 105; *Spears v. Forrest*, 15 Verm. 435.

As a general rule, it is clear that the question of chasteness cannot become a proper inquiry to discredit a witness; but to this rule there are exceptions: for on an indictment for a rape, or in a proceeding for seduction, and the like, it is admissible, at least to impair the weight of testimony. *U. S. v. Vansickle*, 2 M'Leans, 223.

Indeed, the proof of particular offenses, or facts, of any nature, is not admissible for the purpose of impeachment. How then can it be considered competent to prove the bad charac-

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ter resulting only, in many instances, from some such offense or fact? That evidence of having committed a crime or offense is incompetent, is shown by some of the authorities already cited. See also *Barton v. Morphis*, 2 D v., N. C., 520; *Walker v. The State*, 6 Blackf., 1; *Rixey v. Bayse*, 4 Leigh's Va., 330; *U. S. v. Brockens*, 3 Washington, C. C., 99; *Clarke v. Hill*, 2 Har. and M'Hen., Md., 378; *Cole v. Cole*, Har. and J., Md., 572.

But when a witness has been legally and finally adjudged guilty of an infamous crime, he is rendered incompetent, unless rehabilitated by pardon. Such infamy results only from the heinous crimes classed as treason, felony, and the *crimen falsi* as understood at common law. Formerly the punishment was considered the cause of infamy, but now it appears settled that the infamy arises from the enormity of the crime; and still the fact that a mere pardon in most cases restores competency is not altogether consistent with the idea that it is the crime alone which induces the exclusion; for the corruption—the moral depravity, indicated by the crime, is not removed by the pardon; but the condemnation is, and with it is removed the infamy as a witness. But this question of infamy, though adverted to in the arguments by counsel, has but little bearing upon the leading point involved in this case. And upon this point—upon the inquiry as to the proper method of interrogating an impeaching witness, sufficient has already been stated. The decision of the district judge in prohibiting a method of inquiry so loose and unrestrained, is, we think, clearly consonant with the soundest and safest principles of evidence. In proceeding to impeach a witness, the very object of the examination sufficiently indicates and determines the proper inquiry. The object is not to expose the bad character of the witness generally and indiscriminately to public scrutiny, but rather to develop his character for veracity—to determine his credibility. His character for truth is the character sought, and not his character as a bad man, or a good man, in anything or everything else; in the comprehensive and various applications of “good” and “bad,” as applied to character. The

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real object of the inquiry can only be effectually attained by showing whether the witness is generally considered worthy of credit in the neighborhood in which he lives, and among those by whom his character for truth is best known.

Starkie declares the proper method of impeaching a witness is by general evidence, that he is not worthy to be believed upon his oath; and that the proper question is, "Whether he would believe him upon his oath?" Starkie on Ev., part 2, 146. A witness called to impeach another is not to speak of his private opinion, or of particular facts in his own knowledge; but he must speak of the common reputation among his neighbors and acquaintances, and of his general character in point of truth. Swift's Ev., 143.

In 2 Russell on Crimes, 635, the rule laid down is, to ask the witness whether he has had means of knowing the general character of the witness sought to be impeached; and whether, from such knowledge, he would believe him on his oath? This is the prevailing rule in England, and is recognized in New-York. *Johnson v. The People*, 3 Hill, 179; Cowen and Hill's Notes to Phil. on Ev., n. 531, p. 767 to 771.

Phillips states that the regular mode of examining into general character is to inquire of the witnesses, whether they have the means of knowing the former witness's general character, and whether, from such knowledge, they would believe him on his oath. 1 Phillips on Ev., 292. Indeed, the English authorities uniformly favor and recognize this manner of interrogation, and though much more specific, and in conformity to the object of the inquiry, than the method urged by plaintiff's counsel in the present case, we still regard it as very objectionable. There is manifest impropriety, we think, in permitting the witness to testify as to his own opinion, in believing the person under oath. It is a deviation from that salutary rule of evidence which precludes the opinions of witnesses, except as experts in some questions of skill and art, or in the value of property, and as witnesses to a will. The testimony should be confined to facts relative to the general reputation of the witness for truth, and from those facts the jury

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are to form an opinion. It was justly remarked, in the case of *Phillips v. Kingfield*, 1 Appleton's R., 375, that "to permit the opinion of a witness that another witness should not be believed, to be received, and acted upon by a jury, is to allow the prejudices, passions, and feelings of that witness to form, in part, at least, the elements of their judgment. To authorize the question to be put, whether the witness would believe another witness on oath, although sustained by no inconsiderable weight of authority, is to depart from sound principles and established rules of law, respecting the kind of testimony to be admitted for the consideration of a jury, and their duties in deciding upon it." These views are rational, and must commend themselves to the experience and judgment of every lawyer. Mere opinions are never very reliable, and when emanating from the haste and excitement of a witness' stand, are seldom well-matured or deliberately given; and expressed as to the character of others, they are too often influenced by personal disagreement or party malice, to be regarded as a safe inquiry, or a reliable test of veracity. We rejoice, therefore, that the propriety of the practice has of late been questioned by many of our soundest jurists and able American courts; and that, in the language of Greenleaf, "perhaps the weight of authority is now against permitting the witness to testify as to his own opinion." 1 Greenl. Ev., § 461.

Judge Story says, in the case of *Gass v. Stinson*, 2 Sumn. 610, "When the examination is to general credit, the course in England is, to ask the question of the witnesses, whether they would believe the party sought to be discredited upon his oath? With us, the more usual course is to discredit the party by an inquiry, what his general reputation for truth is, whether it is good, or whether it is bad?"

Swift's Evidence, 148, adds much weight to our position. The author confidently declares, that a witness called to impeach another is not to speak of his private opinion or of particular facts in his own knowledge; but he must speak of the common reputation among his neighbors and acquaintances; and that the only proper questions to be put, are: "Whether

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he knows the general reputation of the witness intended to be impeached, in point of truth, among his neighbors? and what that reputation in point of truth is—whether good or bad?” This we believe to be the legitimate and true course of investigation. It limits the inquiry to the specific object sought. It particularly directs the attention of the witness to the subject and facts about which he is called upon to testify; and brings the question of credibility, and the testimony, in a reliable form before the jury. Having before them his general reputation for truth, together with his manner of testifying, and other connecting circumstances, they are enabled to arrive at a correct conclusion upon the question of the witness’s veracity.

This view of the rule is also supported by Judge McLean, in the case of *United States v. Vansickle*, 2 McLean’s, 219. In concluding his able and elaborate opinion in that case, the judge remarks that, “As the rule now stands, we think a witness can only be impeached, under this head, by proof of general character as it regards his veracity.”

Having carefully examined all the authorities within our reach, we have, in deciding this case, endeavored to follow those of prevailing right and reason. We have endeavored to recognize and adopt those rules which will best subserve the ends of justice; which are best adapted to the character of our people, and the jurisprudence of our state.

Judgment affirmed.

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Where G assigned a note to C., Oct. 24, 1841, and on the 18th of December following, C. assigned the same to W., without recourse; some time after W. assigned in the same way to B., from whom the note came to the possession of D; it was held that as B. had no recourse on W., and W. none upon C., that C. was not responsible to any subsequent indorsee; it was also held that G. having been discharged from all liability as an

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indorser to all the indorsees, except D., by lapse of time and negligence to collect, and D. having executed a release to G., rendered him a competent witness.

Illegal testimony will not vitiate the proceedings, when it is upon a point not properly before the court; and hence a proceeding to foreclose a mortgage cannot be affected by improper testimony in relation to the note, as the mortgage is the basis of the action.

After a bill is dismissed as to one of the defendants, he appearing as one of the makers of the note, for which the mortgage was given as security, and interested in defeating a recovery upon the mortgage, he should not be admitted as a witness in the case.

Under the statute authorizing parties to contract for interest not exceeding twenty per centum per annum, it was legal to make a note drawing twelve per cent., and if not paid when due, fifteen per centum per annum. It will not be considered by a court of equity as a contract for a penalty, but for interest after a given day.

Where B. signed the note as security, and subsequently took it up, it was not rendered *functus officio*; he might re-issue the note as often as he took it up.

B. and W. not being parties to the mortgage, the bill to foreclose it was properly dismissed as to them.

In a decree of foreclosure the district court has no authority to order the sale of any other land than that described in the mortgage.

APPEAL in Chancery, from the Cedar District Court.

This was a bill in chancery, filed by Daniels, to foreclose a mortgage against Wilkerson. Bill states that Wilkerson owned the E. half of N. W. quarter of section 9. T. 8. N. R. 3. W. That Philip Wilkerson, John W. Wilkerson, and J. R. Briney, on the 20th of April, 1843, being indebted to petitioner \$357, on a note given by defendants, to R. Ransford, and at that time in possession and ownership of petitioner, Philip Wilkerson to secure the payment of the note at a future day, gave a mortgage to petitioner, on the land above described, dated April 20, 1843, conditioned that the payment of the note should be made by Aug. 20, 1843. The money was not paid at the time named, and petitioner applied to Philip, John, and to Briney for payment, and each refused.

Philip Wilkerson answers that he gave the note, signed it as security for his brother John; knows nothing about Daniels being the owner of it; avers, according to his best know-

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ledge and belief, that Briney, one of the makers, had, before the mortgage was given, taken up and paid the note in full to John Wolf, the holder thereof, and that Wolf passed it away, without assignment; that when Briney had taken it up, the note had performed its office, and to put it in circulation again, was illegal and fraudulent, both in Briney and in Daniels, who purchased of him. Defendant gave the mortgage without any knowledge that Briney had paid it to Wolf, the holder, or to any one else, and insists that the mortgage which was given without consideration, is inequitable, and void. He also states, that without any knowledge on the part of defendant, his brother John Wilkerson had paid on the note, before the mortgage was given, and not credited thereon, \$150, by a note on William Edgar, which Daniels agreed should be credited on the note, as soon as Edgar should acknowledge that the note was correct, and defendant avers that Edgar acknowledged the note correct, Oct. 1, 1843.

John Wilkerson pleaded in bar; 1. that the note was paid in full, by Briney, the maker, before it came to Daniels' hands; 2. that he paid Daniels \$150 on the note before suit commenced; and 3. denied to the court of chancery the power to enforce the penalty named in the note, and as claimed in the bill.

J. R. Briney pleaded that he paid John Wolf the note in full.

Hosea W. Gray, as witness for the petitioner, testifies that he assigned the note to Addison Daniels. While he was the holder, both Philip and John Wilkerson acknowledged the justness of the note, and expected to pay it. No payment was made whilst he held it.

Accompanying this declaration is petitioner's release to the witness.

The same witness proves the handwriting of the indorsers, except Ransford. In regard to his indorsement, he says, "the signature of Richard Ransford was acknowledged by said Ransford to me, to be his signature."

S. Whicher, for the appellant. This cause comes up to be tried on its merits, in the same manner as if no decree had

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been made in the court below. The appellant will limit himself to making a few points in the case, deeming an argument unnecessary.

1. Hosea W. Gray is incompetent as a witness. He assigned the note to Craig, and not to Daniels. He is liable to Craig at law, and Daniels' release does not discharge him from liability. Indeed, he is not liable to Daniels at all at law; and, to say the most of it, it is doubtful in chancery. The release, then, amounts to nothing. The witness comes with all the weight of liability to Craig, resting upon him. If the witness can make defendant pay the money, he will be relieved from all responsibility to Craig.

2. Not only is this witness not competent, but the testimony he gives is illegal. His testimony, that he heard Ransford say he had signed the note as indorser, is but hearsay. Cowen and Hill's Notes, part first, 164, 555, 663.

What the defendant said about it might be evidence direct; but Ransford is not a party to the suit; is not, in the language of the book above cited, "identified in interest" with the defendant.

But still more than this, the witness says he assigned the note to Addison Daniels. Is this true? Does not the note itself show, by the indorsement, that he assigned it to Craig, and not to Daniels?

If it be necessary to prove the assignments, (and that it is, see 1 Eq. Digest, 278,) then they are not legitimately proved. If it be unnecessary to prove the assignments, then the suit is founded on the mortgage alone, and John Wilkerson should have been admitted to testify, after the dismissal of the bill to him, as to the payment; for he had no interest to defeat the mortgage; but rather to make its proceeds pay the note.

The rules of evidence and rules of decision are the same in courts of law, and in courts of equity. 3 Eg. Dig., 357.

A court of equity will not aid a party to enforce a penalty. The penalty for not paying promptly, as stipulated in the note, amounts now to more than \$40, besides the exorbitant interest first reserved, of twelve per centum per annum.

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When a bill or note is paid by the acceptor, or maker, it is *functus officio* at common law, and no longer re-issuable. Chitty on Bills, 449, referring to *Callow v. Lawrence*, 3 M. and S., 97. *Hubbard v. Jackson*, 4 Bing., 390; 1 Moore and P., 11; 3 Car. and P., 134. *Holroyd v. Whitehead*, 1 Marsh., 130; 2 Starkie R., 251.

The parties pleading should not have been dismissed, and the truth of their pleas should have been tried by a jury.

The decree is rendered against lands not named in the mortgage. Compare them.

The appellant asks that the petitioner may be referred to a court of law for redress.

W. G. Woodward, for the respondent. This is a bill to foreclose a mortgage against Philip Wilkerson, alone originally. John W. Wilkerson and J. R. Briney were afterwards improperly made parties. On the hearing, the bill was dismissed, as to John Wilkerson and said Briney. It now stands as a bill against Philip, alone.

I wish to fix one principle at the outset. Any party to a note, or bill, having taken it up, or paid it, may issue it again; but he will not thereby render any subsequent party liable. Thus, a drawer of a bill, having taken it up, may re-issue it; and so, *ad infinitum*, till the acceptor takes it up. The original maker of a note stands in the same relation to his note that an acceptor does to a bill. And one who appears on a note, to be a surety, is to the note what a drawer is to a bill. He is not the ultimate payer. The maker is responsible to him, if he, the surety, pays it.

As to the maker, then, the surety may re-issue; but he cannot render liable the parties *posterior* to himself. For these principles, see Chitty on Bills, 248, 249, 250, *n.* (1), p. 271, 272, 451, and *n.* (20); the case of *Claridge v. Dalton*, 4 M. and S., 232, 233. On the same principle, indulgence to a prior party discharges all subsequent ones. Chitty on Bills, 444.

But when a party takes up a note, all prior to him remain

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liable to him. The maker of a note is he who is ultimately liable, and a surety is not such; at least, where he appears on the face of the note to be surety.

Now by these principles try this note. If Briney takes it up, are not Philip and John liable to him? and if so, cannot he pass it, leaving only himself, John, and Philip liable? Then, if it come into Daniels' hands from Briney, none are liable to Daniels who were not so to Briney. No person is injured. It does not appear but that Daniels became holder of the note before it became due; for it fell due on 1st January, 1843, and in April, Philip gives the mortgage in consideration of farther time.

As to Briney and Daniels. Both Philip and John are original makers, even though Philip may really be surety, as between him and John. Now, in April, 1843, Philip makes a mortgage to Daniels, receiving the payment of this note, and recognizing the note, and securing it in terms to be the property of Daniels, and that, of course, with the indorsement to Briney on it.

Let us now see the objections of appellant. 1. H. W. Gray is an incompetent witness, for he is liable to Craig. Gray is liable to no one on the note. It having come into the hands of Briney, the surety, all subsequent parties are discharged. Craig can be liable to no one, and therefore no one to him. There was no need of the release to Gray.

The present holder, Daniels, has taken security from, and given time to, one of the makers; and therefore, again, all posterior parties are discharged from Gray to Wolf, and even Briney himself. Gray, then, is a good witness. But it is said, to discredit him, I suppose, that he assigned to Craig and not to Daniels, as in the indorsement. Taking the law into view, there is no discrepancy here. Gray may have assigned to Daniels by blank indorsement, and Daniels to Craig; and Craig filled up the indorsement, and then passed it, so that it should come round to Daniels again.

That Daniels is the rightful holder cannot be doubted, since the mortgage expressly admits it. Gray's testimony is com-

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petent, then, but it is not needed in the case, even to prove the indorsements; they need not be proved. Daniels does not hold under an indorsement, but by an assignment in equity, recognized by the mortgage.

2. The declarations of Ransford, that he was a party, and liable to Gray, are good testimony, and admissible.

3. John W. Wilkerson should have been admitted to testify. Not so. Philip is the only defendant to this bill; and he says in his answer that he was surety for John. According to this, John is the ultimate party liable; and is liable to Philip. Now if John can show the note paid, he not only saves Philip, but he saves himself from liability to Philip. This is clear.

4. *Penalty.* There is no penalty in this note. The highest rate reserved is legal interest, as the law then was. But, if there is penalty, the court will give all but the penalty—the note and the legal interest.

5. The parties, John W. and Briney, must have been dismissed. They have no connection with the mortgage, to foreclose which the bill is brought.

6. The bill and decree vary in describing the land. The bill calls it in town, 8 N., the decree, 80 N. In the bill it is described as in Cedar county, Iowa; the court can know, that town 80, and not 8; north, is in Cedar county. The decree corrects the error. I do not know whether this is not an error in transcribing.

7. The appellant asks that the petitioner may be referred to a court of law for redress.

Opinion by HASTINGS, C. J. The appellee filed his bill in chancery to foreclose a mortgage executed by appellant, to secure the payment of \$357, due by a promissory note drawn by appellant and others, of which the following is a copy:—

“ §283.

Twelve months from the first of January next, we, or either of us, promise to pay Richard Ransford, or order, the

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sum of two hundred and eighty-three dollars, with twelve per cent. interest; and, if not paid to the day, fifteen per cent. from date, for value received of him this 29th day of July, 1841:

JOHN W. WILKERSON, [Seal.]
 PHILIP WILKERSON, [Seal.]
 J. R. BRINEY, *Security*.

INDORSEMENTS.

"Pay the within note to Hosea W. Gray. Oct. 24, 1841.
 RICHARD RANSFORD."

"October 24, 1841. I assign the within note to Thomas Craig, for value received of him:

H. W. GRAY."

"I assign the within to John Wolf, without recourse on me.
 Oct. 18, 1841:

THOMAS CRAIG."

"I assign the within to J. R. Briney, without recourse.

JOHN WOLF."

After several continuances, demurrers, and pleas, the appellee obtained a decree of foreclosure at the May term of Cedar district court; from which decree the appellants prayed an appeal, which was allowed, and the case is thus brought to this court.

We will proceed to consider and dispose of the several points suggested by appellant's solicitor. Appellant first alleges, that Hosea W. Gray was incompetent as a witness, for reason of interest; that he is liable to Craig as indorser.

It is true, that Gray assigned the note to Craig, but Craig assigned the note to Wolf without recourse, and Wolf assigned the same to Briney without recourse; and the note afterwards fell into the hands of Daniels, the appellee. Briney has no recourse on Wolf, nor has Wolf recourse on Craig, and Craig is not liable to any subsequent indorsee. Gray is not liable to Craig, nor to any subsequent indorsee, except Daniels.

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Gray is discharged from all liability, as an indorser, to all the indorsees except Daniels, by lapse of time and want of diligence in collecting the note.

Then Gray is liable only to Daniels, and Daniels executed a release to Gray, and thus, being divested of all liability as an indorser, Gray became a competent witness.

But it is said, by the appellant, that Gray's testimony is illegal as to the proof of Ransford's signature. The testimony of Gray in proof of the signatures of the indorsers was unimportant; and however illegal any part of his testimony might be in relation to the genuineness of the signatures of the indorsers, such illegal testimony would not vitiate the proceedings on the mortgage. The suit is not founded on the note—it need not have been introduced. The mortgage is the basis of the proceedings, and on the foreclosure thereof the introduction of the note was not necessary.

Another point, suggested by appellant, that Gray testifies that he assigned the note to Daniels, and that the copy of the indorsements shows that he assigned the note to Craig. Is the indorsement of Gray to Craig inconsistent with his testimony that he assigned the note to Daniels? From Gray's testimony it may be fairly inferred that Briney transferred the note to Gray, and that Gray then transferred the note to Daniels. This second assignment of Gray may have been on a separate paper; and inasmuch as Daniels is in possession of the note, it must be presumed that Gray did assign or transfer the note to Daniels, as stated in his deposition.

It is argued by appellant's solicitor, that John W. Wilkerson should have been admitted as a witness, after the bill was dismissed. As to him, we think not. Wilkerson was clearly interested in reducing the amount sought to be recovered. On the face of the note he is a maker, and liable as such, and was interested equally with the appellant in defeating any recovery on the mortgage.

The statute in force, at the date of the execution of the note, regulating interest, permitted parties to contract for the payment of interest at the rate of twenty per centum per annum.

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The makers of this note agreed to pay twelve per centum per annum from date, and if not paid to the day, fifteen per cent. This cannot be construed as a penalty, against which a court of equity will afford relief. It is a contract to pay fifteen per cent. interest per annum on a contingency, which we think the law then permitted. It is farther argued by appellant, that when the note was taken up by Briney it became *functus officio*, and was no longer re-issuable.

Briney appears on the face of the note a surety, and though liable as a maker, as to the makers of the note he is a surety, and as such, when he put the note in circulation, he assumed the character of a drawer, and could re-issue the note as often as he should take it up.

“A bill of exchange is negotiable, *ad infinitum*, until it has been paid by the acceptor, and therefore, if the drawer pay it after it is due, he may, even a year and a half afterwards, indorse it to a fresh party, who may sue the acceptor thereon.” Chitty on Bills, 249.

By express legislative provision of the stamp laws in England, a bill once paid by the acceptor is no longer re-issuable; but in this country, if a promissory note be paid by the maker, and again by him put into circulation, he is liable thereon, as the maker, to any indorser into whose hand the same may fall, after the re-issuing of the same.

It is further argued, that the parties defendants, John W. Wilkerson and said Briney, should not have been dismissed, and that the truth of their pleas should have been tried. They ought not to have been made parties. They were not parties to the mortgage, and it is not for the appellant to complain of the dismissal of the bill as to said Briney and John W. Wilkerson.

As to the last point made by the appellant, that the decree is rendered against lands not named in the mortgage, it appears that the lands described in the mortgage are in township eight. And such is the description of the premises in the bill; there being no averment in the bill that this description of the township was erroneous. In the decree there is an

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order for the sale of said premises described as in township eighty. The statute on mortgages requires that the premises described in the mortgage shall be sold, &c. The premises described in the decree are not the premises described in the mortgage, and the court below was not authorized to decree a sale of lands other than those described in the mortgage. So much, therefore, of the decree which orders a sale of the east half of the north-west quarter of section No. 9, in township No. 80, north of range No. 3, west of the fifth principal meridian, will be reversed.

We see no reason for reversing any other part of the decree of the court below; and the same is affirmed, and a decree will be entered accordingly.

Decree affirmed in part.

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A lien, by attachment, or by a judgment, will hold against a prior unrecorded deed.

ERROR, to Cedar District Court.

Wm. G. Woodward, for the plaintiff in error. The facts in this suit are: 1. Jennings being owner, conveyed the land to Tomlinson, Aug. 9, 1841. 2. Tuthill attached the land in a suit, *v. Jennings*, Sept. 24, 1841. 3. Tuthill got judgment, May, 1842. 4. Deed from Jennings to Tomlinson, recorded Oct. 11, 1842. 5. Tomlinson conveyed to Brown, Oct. 12, 1842, and recorded same day. 6. Property sold on Tuthill's judgment, Nov. 19, 1842. 7. Deed from sheriff to Tuthill, June 7, 1844, and recorded same day.

The only question is, whether Tomlinson's deed, Aug. 1841, and recorded, October, 1842, or Tuthill's attachment, Sept.

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1841, perfected by sale, Nov. 1842, and by deed, June, 1844, has priority. Two elementary principles give direction to the inquiry. 1. No title passes by sheriff's sale until deed is given. *Simonds v. Catlin*, 2 Caines, 61. 2. A sheriff's deed must be recorded like others. *Rev. Stat.* p. 203, §§ 6, 30, and 31. This is the doctrine in N. Y. 4 John. 206; 13 *ib.* 471; 8 Wend. 625; 4 Cowen, 602; 9 *ib.* 120. This places sheriffs' sales and deeds upon the same grounds with others. In N. Y. a judgment is a lien. Yet a sale before judgment, and the deed recorded after, the deed holds. 4 John. 216; 9 Cowen, 120. If vendor does not permit a sale to take place under the judgment, before recording his deed, and farther, if there be judgment against A, then A sells, and the deed is recorded before a sale and deed under the judgment, the deed of A holds.

Again, there is a sale and sheriff's deed against A; then A sells to a *bona fide* purchaser, whose deed is first recorded; the deed from A holds. 13 John. 471. These principles are held in the cases before cited, and in 6 Wend. 213, pp. 224, 227. The case in 4 John. 216, is this case. And these seem to be fair deductions from the doctrine of requiring sheriffs' deeds to be recorded. The case of *Martin v. Dryden*, in 1 Gill. 191, depends upon the securing of creditors, in their statute, against an unrecorded deed. We hold that Tomlinson's deed has priority.

William H. Tuthill, pro se. In this case the matters of fact and evidence relating thereto, being of record, are undisputed; the issue therefore, is solely upon the law appertaining to, and governing those facts. The only question really presented to the court for decision is, whether the defendant by his proceedings in attachment against Charles M. Jennings, has obtained a legal title to the real estate in controversy as against the plaintiff in error.

It is conceded on both sides that the premises in dispute were rightfully held by Jennings, both claiming under him as the common source of title; the plaintiff by deed from Jen-

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nings to Tomlinson, bearing date the 9th August, 1741, and deposited for record the 11th October 1842, and a subsequent deed from Tomlinson to him.

The attachment of the defendant was levied on the property in question, on the 24th of September, 1841, being more than a year prior to the record of the deed, on which the plaintiff's claim is based.

It is not alleged by the plaintiff, that the defendant had notice of Jennings' conveyance to Tomlinson, other than that imparted by the record, as above stated, which is admitted to be subsequent to the levy of the attachment, and by the agreed statement shown to be subsequent even to the judgment itself, which was rendered on the 18th of May, 1842, in the Cedar county district court, (and which, by the way, was a special judgment against the property attached.)

The only material point in the whole case is, whether by an attachment levied, or judgment had, a lien is acquired which will take precedence of a prior unrecorded deed, of which the attaching creditor had no notice at the time of the levy of his attachment. I suppose the correct rule to be this, that the lien on real estate created by an attachment or judgment, is dependent, so far as the time from which it commences on the statute law of the state wherein the judgment was rendered, and that the general principle is, that property seized under attachment is in *custodia legis*, subject to the judgment and the satisfaction of the debt condemned in satisfaction by the judgment; that the rights of the plaintiff, after judgment at least, are the same in every respect as if seized under execution, and the rights acquired relate back by operation of law, and the lien attaches from the date of the levy. This view appears to have been taken by the supreme court of Illinois, in the case of *The People v. Cameron*, 2 Gilman, 471, wherein they say, "the chief object of the attachment law, is to place the estate of the debtor under the immediate control of the law, and subject it to the payment of his debts. By the service of the writ the plaintiff acquires a qualified lien on the estate attached for the satisfaction of his particular

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debt, which may become perfect, when the debt is merged in the judgment." See 1 Gilman's Reports, 191 to 213, and cases therein cited. 4 Kent's Com., (4th ed.) 435; *Parker's Lessee v. Miller*, 9 Ohio Rep. 108; also, 1 Mc Lean, 95; 7 Peters, 464; 13 *ib.* 151; 3 Pickering, 149; 4 *ib.* 253; 13 *ib.* 477; 11 Mass. 475; 15 *ib.* 233; 3 Scammon, 143; 3 *ib.* 305; 1 Dana, 166; 4 Bibb, 78; 5 Law Rep., 393, 505; 7 *ib.* 87; 1 Metcalf, 212; 1 Pickering, 234; 1 *ib.* 389; 1 Blackf. 22.

It would appear that the various cases, seemingly in point, which are considered leading cases on this subject, and in some of which the decisions apparently conflict, have turned upon the peculiar wording of the registry law of the state wherein the decision was made: for instance, in Illinois the statute provides "that all deeds and title papers of whatever description for land, shall be in force and take effect from and after the time of filing the same for record, and not before as to all creditors and subsequent *bona fide* purchasers and mortgagees without notice; and, as to them, all such deeds and title-papers shall be adjudged void, until the same shall be filed for record in the county where the land may lie. Gale's Stat. 664, § 5, also 152, § 15; and the question there arose and was decided as to who should properly be considered creditors within the purview of the law. *Martin v. Dryden et al.*, 1 Gilman, 217, 218.

In the state of New York the law differs materially from most of the other states, and the decisions there are opposed to the current of decisions in Massachusetts, Connecticut, Ohio, Kentucky, and Illinois for that reason. By the revised statutes of that state, 1 N. Y. Rev. Stat. 756, neither the judgment creditors nor any other creditors, as such, were protected at all, but only *bona fide* purchasers and incumbrancers; the latter, meaning those who were incumbrancers, technically speaking, by the act of parties, and not by operation of law. It became necessary, therefore, for a creditor in that state, in order to obtain the protection of the statute, not only to obtain judgment, but to purchase under that judgment and procure his

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deed and have it recorded before the recording of the prior deed, so as to become a *bona fide* purchaser within the meaning of the statute. This done, the statute protected him against a prior unregistered deed, not as a judgment creditor, but as a *bona fide* purchaser. *Jackson v. Chamberlain*, 8 Wend. 625, 626.

It will therefore be seen that the decisions on this subject, cited in the New York Reports, cannot have any weight or bearing on the point here at issue, the statutory provisions of the two states on the subject being manifestly different and repugnant.

Our law in relation to the registry of deeds is much more comprehensive and broad in its language than the laws of either of the states heretofore mentioned. It will be observed, by referring to the 29th, 30th and 31st sections of the act, entitled "An act to regulate conveyances," approved January 4, 1840, that "no instrument in writing, that conveys any real estate, shall be valid, except between the parties thereto, and such as have actual notice thereof; until the same shall be deposited with the recorder for record."

If, in our statutes, "all words and phrases shall be construed and understood according to the connection and approved usage of the language," and the registry law of this state is not a nullity, then the conveyance, on which the plaintiff in error predicates his title, could have no effect as against the defendant, until the same was deposited for record.

In a late decision of the supreme court of Illinois, the question arose, whether a lien was created at all by the levying an attachment. And although the statutes of that state do not in express words create such a lien, it was decided that a lien was clearly deducible from the tenor and spirit of the statute. *Martin v. Dryden*, 1 Gilman, 191, 210. Now, our law allowing and regulating writs of attachment, *Rev. Stat.* p. 79, § 7, which is a re-enactment of the law, "approved January 17, 1839," declares that "the property attached shall be bound from the time of serving the writ."

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It is clear, therefore, by the express language of the statute, that a lien is created by the levying an attachment, and perfected by the judgment obtained on it.

Should there, however, be the faintest semblance of a doubt whether a lien was created by the service of the writ of attachment, it will be observed that the judgment itself was rendered before Jennings' deed to Tomlinson was deposited for record, and the provision in our statute relative to judgment liens will cover the whole case.

In the 6th section of the "Act to prevent frauds," as approved January 16, 1840, *Rev. Stat.* p. 271, it is explicitly declared, that "Judgments in the district and supreme courts of this territory shall have the operation of, and shall be liens upon, the real estate of the person or persons against whom such judgments may be rendered, from the day of the rendition thereof in the county within which such judgments may be rendered."

The conclusion is therefore irresistible, that the legal title is in the defendant.

Opinion by GREENE, J. This was an amicable suit, arranged between the parties, to test their respective rights to twenty acres of land in Cedar county. By arrangement, Brown as plaintiff, filed his declaration in an action of right. It appears without dispute, that Charles M. Jennings had title to the land in question, on the 21st Sept. 1841, at which time William H. Tuthill sued out a writ of attachment against said Jennings, which was served on the 24th of that month. In the proceedings under the attachment Tuthill obtained judgment on the 18th of May, 1842. Execution was issued and levied on the property, on the 23d Sept. following, and on the 19th Nov. it was sold to the plaintiff, Tuthill; and a sheriff's deed was executed to him, on the 7th of June, 1844, which was filed for record on the next day. The same land was sold by Jennings to John J. Tomlinson, and a deed executed on the 9th of August, 1841, and filed for record on the

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11th of Oct., 1842, and on the next day a deed was placed upon record, conveying the land from Tomlinson to Brown. Upon these facts the court below found the title to be in the defendant, Tuthill, and rendered judgment accordingly.

The only question involved in this case is, will an attachment levy, or a judgment lien, have precedence over a deed previously executed, but subsequently recorded. And this point we have no difficulty in deciding under the statutes of our state.

Brown traces his right to the land in question, by a deed from Jennings, who held the undisputed fee, to Tomlinson, executed Aug. 9, 1841; and then by deed from Tomlinson to himself, dated Oct. 12, 1842, one day after the deed from Jennings to Tomlinson had been filed for record. Under the *Rev. Stat.*, p. 209, § 31, no deed is valid, except between the parties, or between those who have actual notice thereof, until deposited for record. As the present deed was not deposited for record until the 11th of Oct., 1842, it could not affect the levy made by virtue of the attachment, on the 24th of Sept., 1841. From the date of that levy the land was under legal control; and the claim of the creditor operated as a conditional lien upon it, and became absolute when his claim was merged into a judgment. Thus the judgment attached a lien upon all the right not transferred and of record, which the debtor may have had in the land, prior to the attachment levy. With a proper regard to the object and spirit of the attachment, and of the registry laws of our state, we can come to no other conclusion than that a legal attachment lien will hold against a prior unrecorded deed. And there is another reason why the lien, adverse to the deed, must be recognized in this case. It was not only secured by the attachment, and "bound from the time of serving the writ," *Rev. Stat.* p. 79, § 7; but the lien was confirmed and made absolute by the judgment, which was rendered previous to the registry of the deed. The judgment by virtue of the statute, became an absolute lien from the day of its rendition. *Rev. Stat.* p. 271, § 6. As to the effect of a judgment upon real

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estate, see *Harrington v. Sharp*, decided at the present term of this court. (a.)

We should feel more hesitation in deciding this case, if the authorities referred to by plaintiff's counsel were based upon a statute like ours. While such decisions would be applicable to the peculiar registry acts of New York, they would be obviously repugnant to those of our state.

The court below very properly decided, that the right to the land in question was in Wm. H. Tuthill.

Judgment affirmed.

(a.) See *Supra*, p. 181.

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Where a presiding judge certifies that the attestation of a record made by a deputy clerk, in the name of his principal, is in due form of law, it is sufficient, without going behind the certificate, to inquire whether a deputy has a right to so attest a writ by the laws of his state. It is the office of such a certificate to advise courts of other states that such authentication is in due form of law.

By pleading to the merits, a party waives a defect, such as a variation between the transcript described in the declaration, and the one offered in evidence.

The certificate of a presiding judge in Indiana, relative to proceedings before his predecessor, held to be admissible.

ERROR, to Lee District Court.

This was an action of debt against John M. Young, on the record of a judgment from the state of Indiana. Plea, *nul tiel record*. Judgment for the plaintiffs. It is objected that the transcript of the judgment was not properly authenticated, nor correctly described, and therefore erroneously admitted in evidence. The particulars of the objection are shown sufficiently in the opinion of the court.

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George C. Dixon, for the plaintiff in error.

Hugh T. Reid, for the defendants.

Opinion by HASTINGS, C. J. The plaintiff in error files the following assignment of errors :

1. The court erred in admitting in evidence, in the cause, the papers purporting to be a record, or transcript of a judgment, the same being insufficiently authenticated, and therefore not admissible in evidence.

2. The court erred in admitting in evidence, in the cause, the papers purporting to be a transcript or record of a judgment recovered against the plaintiffs in error, in Jefferson county, Indiana, because the same does not appear to be the transcript or record described in the plaintiff's declaration in the cause, and therefore not admissible in evidence.

3. That said judgment was given in favor of the said defendants in error, when, by the laws of the land, it ought to have been given in favor of said plaintiff in error.

The question presented in the first assignment of errors is, was the transcript referred to sufficiently authenticated?

The transcript was authenticated as follows :

"The State of Indiana, } ss.
Jefferson county.

"I, John H. Taylor, clerk of the circuit court of said county, do hereby certify the foregoing to be a true, full, and complete transcript of the record of the judgment and proceedings had in the foregoing case, as appears by the record thereof remaining in my office.

(SEAL.) In testimony whereof I have hereunto set my hand and seal of said court, at Madison, this 12th day of December, A. D. 1845.

JOHN H. TAYLOR, *Clk.*

By BEN. B. TAYLOR, *D. C.*

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"State of Indiana, }
Jefferson county. } ss.

"I, Courtland Cushing, president judge of the third judicial circuit of Indiana, including the said county of Jefferson, do certify that John H. Taylor, Esq., whose name is signed to the foregoing certificate, was, at the date thereof, and still is, clerk of the said Jefferson circuit court. That the said Benjamin B. Taylor was and is deputy; and that said certificate is in due form of law."

The act of congress, relative to the authentication of records, provides that "the records and judicial proceedings of the courts of any state, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form of law."

The name of the clerk is affixed to the attestation by his deputy; and it must be presumed that such an attestation is authorized by the laws of Indiana, from the certificate of the presiding judge, who certifies that said certificate is in due form of law. And we will not go behind the certificate of the judge to inquire into the power of the deputy to issue writs, and sign certificates in the name of his principal. Under the laws of Indiana, the office of a presiding judge's certificate being to advise a court of another state that such attestation is in due form of law.

It is true, that it has been held, that an attestation by an under clerk is not sufficient, nor would an attestation of a deputy, in his own name; but the attestation in this case is in the name of the clerk, by an officer of the law, we presume duly authorized.

As to the second error assigned. We see nothing in the record which shows a variance between the transcript described in the declaration and the transcript introduced as evidence in this case. The declaration commences thus: "Martin Thayer and George S. Bryan, merchants and surviving part-

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ners of the late firm of Thayer, Bryan, and McKee, plaintiffs, complain of John M. Young, defendant, &c. For that whereas the said Thayer and Bryan," &c. The words, "the said Thayer and Bryan," refer to the plaintiffs, as described in the commencement of the declaration. And the plaintiffs in the declaration, in this case, are described in the same manner as the plaintiffs in the transcript of the record from Indiana. Besides, such a defect, (if a defect at all,) could only be taken advantage of on demurrer. The defendant waived the objection by his pleadings.

It appears that the judgment in Indiana was rendered before the Hon. Miles C. Eggleston, the then presiding judge of the third judicial circuit; and the transcript is certified by the Hon. Courtland Cushing, the then presiding judge of the same judicial circuit, who certifies that Jefferson county is in said judicial circuit. We see no objection to the form or substance of this certificate; and are of opinion that the court below did not err, as alleged in plaintiff's assignments of error, and therefore the judgment of the district court in this case is affirmed.

Judgment affirmed.

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A sheriff's deed is admissible in evidence, although it contains a variance, or mistake, in reciting the execution, and also in referring to the decree upon which the land was sold.

The omission of the officer to state in his return that notice had been served upon the execution defendant, as required by statute, cannot prejudice the rights of a *bona fide* purchaser, nor invalidate his deed as evidence.

The valuation law does not require the officer to sell precisely the quantity of land, necessary at two-thirds its appraised value, to satisfy the execution. If more than enough is sold it will not vitiate the sheriff's deed.

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ERROR, to Muscatine District Court.

W. G. Woodward, for the plaintiff in error. In several of the positions taken by the defendant below, and which are contained in the bill of exceptions, we were met by the answer, that they could not be taken by, or against, third persons. We wish to examine this answer. We admit that some errors in process are amendable. Of some, advantage can be taken only by the party or his privy. But we hold the above answer too broad, as applied to this case. The answer was presented with, and supported by, three cases: *Wheaton v. Sexton*, 4 Wheat. 503; *Bybee v. Ashby*, 2 Gil. 165; *Swiggart v. Harber*, 4 Scam. 364; *Wheaton v. Sexton*, 4 Wheat. 593; 4 Cond. R. 518. See the statement of facts.

The only question raised concerning the process, or proceedings was, whether a sale by the marshal, after the return day of the writ, was legal, p. 519. The cause was submitted without argument. The opinion, and the case too, in short, and no cases are referred to.

What is said about the return is extra-judicial. The language is to be noticed, and there is a qualification, or proviso, even here.

It was a case in the District of Columbia, on a point on which the state law governs. The proposition in this case is one of the first impression. The question was then new; and it is to be doubted whether that court intended it as a general proposition, not restrained by the facts of the particular case.

If taken as broadly as laid down, it is against everything else—against all the books and cases.

I proceed to show that the proposition above referred to is not true, as a general proposition. A distinction is made between the “erroneous” and the “irregular,” which is observed in some of the cases, and in some the language is not used strictly. *Woodcock v. Bennett*, 1 Cow. 734; *Gra. Prac.* 390; *Read v. Markle*, 3 John. 525. The irregularity need not appear on the face of the process—it may appear from extrinsic facts.

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I shall now show that there are errors, or irregularities, both in the process, in its issuing, and in the proceedings under it, which are held void. In ejectment, the party may show the want of a *venditioni exponas*. *Porter v. Neelan*, 4 Yeates, 108; *Glancey v. Jones*, *ib.* 213. In *Bond v. Donsdale*, 2 Binn. 80, a *venditioni exponas* issued irregularly, and the court allowed the objection to be taken collaterally, and held the purchaser acquired no title. A sale, even to an innocent purchaser, under irregular process, is void.

1 Cow. 735. In this case execution issued against a defendant who died after judgment, but before execution.

If a judgment has been paid, an execution issued on it is void. *Sherman v. Boyce*, 15 John. 443; *Swan v. Saddlemire*, 8 Wend. 681; *Rud v. Staats, et al.*, 7 Wend. 426. This seems to be true, whether paid before or after execution issued. *Carter v. Simpson*, 7 John. 535, and held a vendee, does not lose his property by reversal. "But no case admits a title in the purchaser, when the officer acted without authority." Commented on in *Jackson v. Cadwell*, 1 Cow. 640; and same doctrine is quoted in Gra. Prac. 365, citing *Swan v. Saddlemire*, 8 Wend. 681. Kent, J. held a *fi. fa.* tested out of term, void.

Suppose a judgment, death of plaintiff, execution, and sale, would it not be void? Gra. Prac. 666; 1 Cow. 218. An execution irregularly issued, is a nullity—otherwise, if erroneous. 3 John. 523. A party against whom a judgment is, appeals from the clerk on the taxation of costs; clerk has no right to issue execution till settled, and execution issued is void. *Winslow v. Hathaway*, 1 Pick. 211.

An application for a new execution, on the ground that a former had been returned satisfied by a levy on land, which was defective, and by which no title was acquired, was substantially an action of debt or *sci. fa.*, and such execution, being granted on motion without the proper notice, is void. *Williams v. Cable*, 7 Conn. 119.

When a levy is made upon land, and the *fi. fa.* be so returned, if a second *fi. fa.* be then issued before the first levy

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is disposed of, the second *fi. fa.* is void. *Arnold v. Fuller*, 1 Ham. 458. If a sheriff sell land on a *fi. fa.*, issued and levied after defendant's death, the sale confers no title. *Cartney v. Reed*, 5 Ham. 221; *Massie's heirs v. Longe*, 2 *ib.* 287.

A sale, under execution after judgment is satisfied, is void, 6 Wend. 367, and the officer is liable as a trespasser. Execution held void for want of a return-day, and a sale of land upon it, was held to pass no title. *West v. Hughes*, 1 Har. and J. 6. It was held a fatal objection to an execution, in Pennsylvania, that it issued more than a year and a day after judgment, without a *sci. fa.* 3 Wash. C. C. 134.

The foregoing cases relate to errors, or irregularities, in the process—its form, qualities, or manner of issuing. The following relate to the proceeding under the process. In New Hampshire, when an execution is extended on land, the appraisers must be resident in the county where the land is, otherwise nothing will pass by the extent. *Simpson v. Coe*, 3 N. H. 85; *Libbey v. Copp*, *ib.* 45.

In Maine, it is essential to the validity of the return of an execution, that it should show that the debtor was duly notified to choose an appraiser. *Means v. Osgood*, 7 Greenl. 146.

In Vermont, a return must be made within the life of the execution, when extended on real estate, or the whole proceeding is void. *Hall v. Hall*, 5 Verm. 304.

In Massachusetts, when an execution is levied on real estate, the return must show by whom the appraisers were chosen, otherwise the levy is void. *Allen v. Thayer*, 17 Mass. 299. If the officer return that he appointed two of the three appraisers, without returning that the debtor neglected, or refused to choose one, the levy is void. *Eddy v. Knap*, 2 Mass. 154; *Whitman v. Tyler*, 8 *ib.* 284. If the appraisers deduct the amount of a previous attachment in a suit pending, considering it as an incumbrance, the levy is void. *Barnard v. Fisher*, 7 Mass. 71.

The officer is bound to notify the debtor, that he may choose an appraiser; and it must appear in the return that he has

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given such notice. *Blanchard v. Brooks*, 12 Pick. 47; *Stan-
ton v. Bannister*, 2 Verm. 464.

The appraisers must be, and they must appear by the re-
turn to be, residents in the county, else nothing passes by the
extent. *Rix v. Johnson*, 5 N. H. 520; *Libbey v. Copp*, 3 *ib.*
45. Execution against several defendants is levied on lands
of which they were severally seized; the land of each must be
severally appraised, otherwise the extent is void. *Burnham
v. Aiken*, 6 N. H. 306.

A levy is void in Connecticut, when one of the appraisers
is tenant to the execution debtor. *Mitchell v. Kirtland*,
7 Conn. 229.

A sale without appraisalment, where the law requires it, is
void. *Patrick v. Ousterhout*, 1 Ham. 27; 3 *ib.* 190; *Curtis
v. Doe*, Breese, 102.

A levy on goods by *fi. fa.*, after the return day is past, is
void. *Devoe v. Elliott*, 2 Cai. 243; *Wheaton v. Sexton*,
4 Pet. Cond. 518.

An inquisition cannot be supported, unless the defendant
has notice of the levy, or the time and place of holding the
inquest. *Heydrick v. Eaton*, 2 Binn. 215. When the sheriff
levies on and sells more land than is necessary to satisfy the
execution, (the land being susceptible of division,) he exceeds
his authority, and the sale is void. *Stover v. Boswell*, 3 Dana,
232. A sale, under execution, after the judgment has been
satisfied, is void. *Chiles v. Bernard*, 3 Dana. 95; *Jackson v.
Anderson*, 4 Wend. 474. If, by reason of unlawful charges,
too much land is taken and set off on execution, the proceed-
ing being an entire and indivisible act, is wholly void. *Beach
v. Walker*, 6 Conn. 190.

If the return state that A, B, and C were appraisers, when
in fact A, B, and D were, and signed the appraisal, the levy
is void. *Nye v. Drake*, 9 Pick. 35.

If, by the return of a levy to the town-clerk's office, it ap-
pear to have been for a larger amount than the execution, no
title passes by such levy, although the return on the original
execution appears to be correct. The record would be notice

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of a void levy only. *Skinner v. McDaniel*, 5 Verm. 539. In the sale of real estate on execution, the recording of the execution, before it is delivered to the sheriff, is essentially requisite to the validity of the execution, under the statute of New Jersey. *Elmer v. Burgin*, 1 Pennington R. 186. Sheriff levies under a *fi. fa.*, and returns the property unsold for want of buyers, then goes out of office, a *vend. ex.* must issue to him, and not to his successor, and if to his successor, all his acts under it are void. *Purl v. Duvall*, 5 Har. and J. 69. A levy, after the term to which execution is returnable, is void. *McElwee v. Sutton*, 2 Bailey, 361.

A sale of goods should be at the place where the goods are, and a sale six miles distant from the goods was held irregular and void. *Cresson v. Stout*, 17 John. 116.

In *Bybee v. Ashby*, 2 Gil. 163, the court say, "The purchaser is bound to inquire into the power and means by which the property is subjected to the sale, and will acquire no right to the land when the sheriff sells without legal authority," and cite 10 Pet. 458; 2 Yeates, 86; 2 John. 280; *Hinman v. Pope*, 1 Gil. 131. In 4 Scam. 370, is a recognition of the point at which we are aiming.

The sheriff cannot sell, on an execution, more land than enough to satisfy the execution and his commission. *Davidson v. McMurtry*, 2 J. J. Marshall, 68.

A sheriff sold certain real estate, on execution, to B, who failed to pay the purchase-money; a few days afterwards, without having adjourned the sale, and without advertising again, he re-exposed the property to sale, and sold it to C, who had notice of the facts. Held that the sale to C was void. *Givan v. Doe*, 5 Blackf. 260.

Why should there be held a great difference between tax-sales, and sales on execution? The only difference is in the authority. In the principle of the proceedings there is none.

The second case relied upon by the plaintiff below, was *Swiggart v. Harber*, 4 Scam. 364. *Sci. fa.* was brought by plaintiffs v. J. Cornelius, to foreclose a mortgage and sell the land. Pending the suit, Cornelius died, and Beaird, adminis-

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trator, made a party,—default and judgment against administrator. It was a general judgment, upon which a special execution issued to sell the lands of Cornelius, which were mortgaged. The judgment should have been special; and the execution was special in accordance with the nature of the case, and what the judgment should have been. There is no objection to the nature or qualities of the execution, nor to the proceedings under it—the objection is rather to the judgment.

Page 374 cites 2 Pet. Dig. 269. There is nothing in this, except a citation of 1 Overton, 165; when it was held that a stranger cannot object to the validity of a judgment under which land is sold. And on same page the court cite *Thompson v. Phillips*, 1 Bald. 266. The only objection was to the process. The case was under a peculiar statute and proceedings. When the sheriff acknowledged the deed in court, where all the proceedings were adjudicated, and all was considered as settled by the judgment of the court, p. 271.

Other cases cited in *Swiggart v. Harber*: 5 Pet. 369; this case does not seem to be quite as stated by the Illinois court. It is a citation of one of Lord Hardwick's decisions. The case supposes a good judgment, but a wrong process. *Bissell v. Kipp*, 5 John. 100. Action against sheriff, for escape. Held that sheriff should not be permitted to take advantage of a variance between the judgment and execution, for he had acted under it. The other cases are all cases against sheriffs, upon the principle that the sheriff having acted under process, cannot excuse his malfeasance or misfeasance, by showing mere defects in the process.

Bryan v. Smith, 2 Scam. 49, cited in 4 Scam. 367, was a case of variance in the costs only, created by lawful increase, by which the costs in a prior execution were less than those in a subsequent one.

Neither these cases collectively, nor any of them singly, go the length of the principle laid down by the court in *Swiggart v. Harber*. This case lays down principles, going altogether beyond the call of the case. It is not a well reasoned case.

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The third case cited against the defendant below, was *Bybee v. Ashby*, 2 Gil. 151. There is little in it to point for plaintiff in this cause.

An execution issued to the sheriff of Knox county, and was levied and executed by the sheriff of Fulton county, in his county. The court below amended it. Held to be error, that it could not be amended, and purchaser took no title.

We now come to our exceptions and errors.

Exception 1. Variance between deed and execution. 2. Variance between deed and decree. The deed is *prima facie* evidence of proper proceedings. *Rev. Stat.* 630. But we may impeach it by showing papers or proceedings erroneous. Defendant denied the existence of such an execution or decree as recited in the deed, and these are shown to be the only ones. These are not the ones recited. If recited, the recital should be true.

It is a settled and inflexible rule, that the execution must follow the judgment, and be warranted by it. 1 Cow. 741; 2 Paine and Duer's Prac. 295.

2. No notice appears in the officer's return to have been given to the execution defendant, as required by *Rev. Stat.* p. 633, § 9. It is a general and well established principle, that where a title is to be divested, or created by statute, all the requirements of the statute must be observed; and must appear to be pursued. This is an important matter to a defendant, especially in a case of a mortgage where specific property is first pledged. He should be informed that the mortgaged property has not paid the debt. How can the officer say that defendant will not pay the balance? How far can we dispense with the required proceedings of the officer, in justice and safety to a defendant?

3. That too much land was taken. The land was divisible. The agents had actual notice. They levied on an eighty-acre lot, part of defendant's farm. They required sixty-three and a half acres, at two-thirds the appraisal, and took the whole sixteen and a half acres, more than enough. They required \$256, 72. They took, at full appraisal, \$480; \$224 too

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much; at two-thirds appraisal, \$66 too much; or \$320, in all at two-thirds.

Several authorities hold this proceeding fatal on general principles. When a sheriff levies on and sells more land than is necessary to satisfy the execution, (the land being susceptible of division,) he exceeds his authority, and the sale is void. 3 Dana, 232. If by reason of unlawful charges, too much land is taken and set off on execution, the proceeding, being an entire and indivisible act, is wholly void. 6 Conn. 190.

The sheriff cannot sell on an execution, more land than enough to satisfy the execution and his commission. 2 J. J. Marshall, 68; 1 Binn. 61. Many cases recognize the distinction between acting under the authority of a court of competent jurisdiction, and yet without conformity to the law; and acting without the authority of a court, and at the same time without conformity to law. And our *Rev. Stat.* p. 630, § 3, settles this matter. Notice the *proviso*, and for the force of it, see 10 Pet. 474.

If not divisible, it should appear in the appraisers return. Who is to say it is not? The appraisers. And even if the sheriff may be the judge, it must appear in his return as explanatory. The word divisible is not to be taken in its strictest sense, for then any thing is divisible. This objection is fatal even against a third person.

But if there be any doubt upon this, then the agents of Beeson had actual notice. And a purchaser having notice of the irregularity, stands as the party. 1 Cow. 641; 4 Wend. 479; 8 *ib.* 681; Gra. Prac. 365, 390.

The cases use the language, "*bona fide* purchaser without notice," and show that one with notice of irregularity is not a *bona fide* purchaser. Gra. Prac. 365, 390; 8 John. 361; 8 Greenl. 207; 3 J. J. Mar. 208; *Jackson v. Cadwell*, 1 Cow. 641, 2; 5 Blackf. 260; 1 Cow. 711; 2 Bibb. 401.

And a party is held responsible for irregularities in proceedings, and sometimes in process. 1 Cow. 622, 645; 5 Pet. 369; 2 U. S. Dig. p. 315, § 6; 2 Gil. 166; 2 Blackf. 1.

And Paine and Duer's Prac. 295, holds a purchaser affect-

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ed by irregularity in proceedings, where he has notice, and cites 1 John. Ca. 143; 1 John. 45; 8 *ib.* 361; 13 *ib.* 97; 1 Gal. 419; 1 M. and S. 425.

R. P. Lowe and *S. Whicher*, for the defendant. This case is here to reverse a judgment in an action of right obtained by the defendant against the plaintiff in error in the district court of Muscatine county.

The plaintiff below claimed title deduced from the sheriff of said county, founded upon a judicial sale, made on the 14th day of November, 1845, by virtue of an execution.

The execution was issued upon a judgment for the foreclosure of a mortgage rendered at the October term of the Muscatine district court, 1844, which judgment of foreclosure for the sum of \$803 12, was in favor of one Jeremiah Burge, and against Charles Mattoon.

The plaintiff below farther showed that Mattoon derived title to the premises in controversy from Humphry, the defendant below. Upon this evidence, together with Humphry's possession of the premises at the time of the commencement of the suit, and Mattoon's possession at the time of the execution of the mortgage and rendition of the judgment, he rested his right to recover.

The defendant relied upon the same source of title, by virtue of a deed of conveyance from Mattoon to himself, dated the 25th November, 1845; also he relied upon a vendor's lien, which was declared on the 25th November, 1845, by a decree of the court, in which Mattoon and Humphry were alone parties to the proceedings.

The court will perceive that, in point of time, the defendant's title, although of the same source, is of younger date than that of the plaintiff's below.

But the defendant below claimed to have impeached the plaintiff's title, and insists upon the same objections in this court, for reasons:

1. That the sheriff's deed, offered by plaintiff, misdescribes the execution under which the sale was had, as to the amount

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of money which the officer was commanded to make. And there was variance between the amount of the judgment as recited in the sheriff's deed, and the judgment in fact recovered by Burge against Mattoon, under which the execution issued and the property was sold.

2. That sheriff's title was not valid, because it did not appear from the officer's return that he had given notice to the execution defendant, as required by the 9th section of *Revised Statutes*, 155.

3. Because the sheriff sold more land than was necessary to satisfy the execution.

The above defects or objections could alone be corrected or taken advantage of by the parties to the proceedings or suit in which they occurred, as by writ of error or motion to set aside, &c. With the proceeding, whether erroneous and irregular or not, Burge and Mattoon have chosen to rest satisfied. It is incompetent for Humphry, a stranger collaterally in another action, to draw in question the correctness of such proceeding, for the purpose of invalidating a title deduced from a judicial sale under said proceeding; unless the irregularity complained of goes to the jurisdiction of the court rendering judgment, or to the execution, or to the levy, and are of such a character as to render the proceeding a nullity; as, for instance, if there was a sale without a levy, or the right kind of an execution, or under a judgment rendered by a court having no jurisdiction.

But in the case of Burge against Mattoon, it is not pretended that the court had not jurisdiction; nor is it pretended that the execution is not valid, or of the right kind; nor is it denied that there was a levy, sale, and deed. These being the only things which a purchaser at a judicial sale need look to; if they exist, they constitute the citadel of his title; all other questions are between the parties to the proceeding. *Buckmaster v. Carlin*, 1 Scam. 104.

But in the case of *Swiggart v. Harber*, 4 Scam. 364, the doctrine is laid down still stronger for us, and discusses at great length and ability, what irregularities in the sale of land

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on execution will, and what will not, vitiate the sale and affect the purchaser's title. It is decided that if these irregularities are not corrected by the court from which the process issues, and such court is not called upon by the defendant in the execution to set the proceeding aside, they cannot be disturbed by any one else in a collateral proceeding.

This case also decides that a variance between the judgment and execution was immaterial.

No error or irregularity in the judgment or execution should affect the purchaser's title at sheriff's sale. *Armstrong v. Jackson*, 1 Blackf. 212.

The intendment is in favor of the purchaser, that the preliminary proceedings were all correct. Finding a judgment, levy, and deed, the purchaser may stop upon the legal presumption that all the preliminary proceedings were correct.

The purchaser must look to see there is a judgment, on which to found an execution, that an execution has been issued and a levy made, but is not bound to inquire into the regularity of all the ministerial acts of the sheriff before or after sale. *Allen v Parish*, 8 Ohio, 191.

After jurisdiction is once acquired, however irregular or erroneous their proceedings may be, they cannot be collaterally impeached; and they conclude all persons, unless annulled by appeal or writ of error. A vast body of authorities bearing upon this point may be found collected in 3 Cowan and Hill's Notes, 803; 8 Ohio R. 553; 5 *ib.* 294; 6 *ib.* 255; 9 *ib.* 18, 117; 6 Peters, 164; *Vorhees v. Bank of U. S.*; 10 Peters, 449. This last recited case is full and very conclusive on most of the points in this case.

What is sufficient for the officer is also sufficient for the purchaser under a judicial sale. If the sheriff be not a trespasser, his sale transfers the property. 12 Ohio, 258.

If the court has jurisdiction of the case, the parties, and power to order the sale by execution, a sale so made, and a deed so acknowledged, cannot be set aside in a collateral action. An objection to such sale must show a want of power in the court. Irregularities must be corrected by the court

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which issues the process. Erroneous proceedings must be reversed on a writ of error, or they are binding. *Thompson v. Phillips*, 1 Bald. 246.

The misrecital of a judgment in a sheriff deed is not material; if it appear in fact that a sale was under a subsisting judgment and execution, a recital not being a material part of the deed. *Jackson v. Streeter*, 5 Cowen, 529; *Craig v. Vance*, Overton, 209.

The recital of an execution in a sheriff's deed is not necessary; and a mistake or variance in the recital is not material, and does not affect the validity. *Jackson v. Pratt*, 10 John. 381; *Jackson v. Jones*, 9 Cow. 182.

The foregoing authorities show, that if the judgment and execution, or judicial sale, under which we derived title to the land in controversy, were irregular or erroneous, still they are not to affect the title of a purchaser who is a stranger to the proceeding under which the sale was had; nor can a stranger to the proceeding collaterally take advantage of the same, or the ministerial acts of the sheriff.

But we deny that there was any irregularity in this case. Consider for a moment the objection, that the sheriff sold more land than was necessary to pay the debt. The 26th section of the valuation law contemplates the sale of more property than will pay the debt, because it provides for the payment of the overplus to the defendant in the execution. Again, it could not have been the intention of the legislature to authorize the sale of land in less tracts than the smallest subdivision of land under the acts of congress, say forty acres, because it would be productive of great mischief and injury to all concerned, leaving small fractions of land in long, narrow strips, that would be useless to any one; the same inconvenience would be felt in the sale of town property. The judgment debt, at two-thirds of its appraised value, might cover the whole lot, except two or three feet on one side, yet what would this be worth to any one.

It is submitted whether the sheriff is not the sole judge, under the responsibilities of his oath and his bond, of the

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quantity of land necessary. He, with the appraiser, must go to the land and view it, and appraise it. If they find that an eighty-acre piece of land is worth \$1,000, it by no means follows that either half of the same tract is worth half that money. Here it is said that sixteen acres too much was taken. How does counsel know this? He undertakes to prove it by the rule of three. Common observation will satisfy us that this rule is not applicable to the division of land, though it might, perhaps, be well addressed to a tape-seller or an apothecary; or to the dealer in any other commodity, in which location forms no element in the calculation of value. Take sixteen and two-third acres from the side, end, or corner of an eighty-acre tract, and it would be sure to injure the value of the small piece, as compared with the whole; and would be quite likely to depreciate the comparative value of the sixty-three and one-third remaining acres.

If the sheriff, who has seen the land, is not the proper judge of quantity, who is the judge? Not the appraisers, for the law does not require it of them. The sheriff makes the levy, and then calls an inquest of value. This inquest knows nothing of the amount of money which the sheriff is commanded to make; nor is it a matter of fact which the court can determine. The only remaining forum is the jury before whom the case was tried. If they are the proper judges of quantity, then they have passed upon it, and found for plaintiff below; and their finding is conclusive.

The law will presume that the officer did his duty in giving notice to the defendant in the execution.

Opinion by GREENE, J. Richard Beeson commenced this suit by an action of right, for the west half of south-west quarter of section twenty-seven, in township seventy-seven north, range two west, being in the county of Muscatine. A declaration and plea to the merits were filed in the form prescribed by the statute regulating the action of right, and the cause was submitted to a jury. On the trial, the plaintiff offered in evidence a deed from the sheriff of Muscatine county, conveying

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to him the land in dispute. It appears that the sale, upon which the sheriff's deed was given, had been made to satisfy a judgment rendered in October, 1844, in favor of Jeremiah Burge, against Charles Mattoon. The plaintiff then gave in evidence the record of a deed from Humphry to Mattoon, to show that the title was in him at the rendition of the judgment; and testimony was also offered, tending to show a possessory title.

1. The defendant objected to the admission of the sheriff's deed, first offered in evidence, on the ground of a variance in describing the execution and in reciting the decree upon which the execution issued. The judge ruled upon this point, that the discrepancies were not material and could not invalidate the deed, if the jury believed that it was derived from and made under the decree.

2. The defendant then objected to the sheriff's returns on the execution, as it did not appear that notice had been served upon the execution defendant as required by statute.

3. He then showed by the returns, that the sheriff, in satisfaction of the execution, had levied upon and sold more land than was necessary, at two-thirds its appraised value, to satisfy the execution. That the land was level, and had no other improvement than an inclosure of about fifty acres, with thirty acres of the field in cultivation, and that the agent of the purchaser had notice of the fact. It was proved that the only objection to dividing the property was, that it would more or less depreciate its value. The defendant claimed, and desired the court to rule, that by disposing of more land than was necessary to satisfy the decree and costs, under the circumstances, rendered the sale of the sheriff irregular and void; but the judge ruled otherwise.

Other questions arose upon the trial of this cause, but as they have not been urged by counsel, and cannot affect the decision, it is not necessary to notice them.

Verdict and judgment for the plaintiff in the court below. The three objections above referred to, are urged by the plaintiff in error to reverse the judgment. As the three points

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urged, and the law pertaining to them are ably reviewed by the arguments of counsel, it is only necessary to give a brief statement of our decision upon them.

1. The variance complained of is merely in figures, in reciting the amount to be made by the execution, and the amount of the decree. We have no evidence before us, in a legitimate form, showing the alleged variance. Our statute declares the deed of the officer, selling the land, to be *prima facie* evidence of the regularity of his proceedings. *Rev. Stat.* p. 630, § 3. But conceding the variance to be as great as is claimed by plaintiff's counsel, it cannot produce the effect of invalidating the sale. The recital of the execution in a sheriff's deed is not essential to its validity; and, as a consequence, any variance or mistake in such recital, can have no impairing influence. The authorities cited by defendant's counsel we regard as conclusive upon this point. Such a variance should be regarded as immaterial, so long as the origin of the deed is clearly traceable to an authentic source; and the irregularity complained of can work no injury to the parties concerned.

In *Perkins v. Dibble*, 10 Ohio, 433, it was held that a sheriff's deed, which recites enough to show his authority, is good, even if it does not contain all that is required by statute. So also in *Armstrong v. McCoy*, 8 Ham. 128.

In *Huggins v. Ketchum*, 4 Dev. and Batt. 414, a sheriff's deed, containing an erroneous recital of the power under which the sale took place, was held to be good; and it was also held that it must be presumed until the contrary is shown that the officer sold the property under the appropriate execution.

That a variance between the deed and execution, or a misrecital in the deed, is not a valid objection to its admission in evidence; see, besides the authorities cited by counsel, the case of *Cherry v. Woolard*, 1 Iredell, 438; *Driver v. Spence*, 1 Ala. 540.

2. Notice to the execution defendant is an essential prerequisite to a sale (*Rev. Stat.* p. 633, § 9); but we are by no means satisfied that the notice must appear in the officer's returns, in order to render a sale valid. It is true, that the

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returns should show service of the requisite notice, and the officer is negligent and censurable who omits so important an item of duty; but still, it is not such an irregularity as will justify a court in setting aside a sale, made to an innocent purchaser, who had no notice of such irregularity; even if the execution defendant had not been notified of the sale.

Though the requirements of the law should be substantially observed, when the title is to be divested; still, the rights of *bona fide* purchasers should also be protected. Mere omission, or irregularity in the proceedings of the officer, cannot impeach his deed, when supported by an operative and unsatisfied judgment. Besides, even though the sheriff's returns do not state the fact, the notice will be presumed till the contrary appears; unless the question is raised on a motion to quash the execution, or set aside the sale, before the deed is executed and the purchase-money paid.

In *Lawrence v. Speed*, 2 Bibb, 401, it was determined that a sale of property, on execution, is not rendered void by the failure of the sheriff to advertise according to law, unless such failure was through fraud, of which the purchaser had knowledge. So far have courts gone in protecting the rights of *bona fide* purchasers, that they have adjudged the property to them, although the judgments from which the sales proceeded were afterwards reversed, *Reardon v. Searcy*, 2 Bibb, 202; *Coleman v. Trabue*, *ib.* 518; *Sneed v. Reardon*, 1 A. K. Marsh. 217. And in *Doe v. Heath*, 7 Blackf. 156; it was determined where a purchaser, at a sheriff's sale, had paid his money, and received a deed for the land, that his purchase could not be prejudiced by the imperfect return of the sheriff, nor by his making no return at all.

3. It is objected that more land was sold than was necessary to satisfy the execution, and that the purchaser had notice of the fact. We see nothing in this proceeding inconsistent with the valuation law, under which the sale was made. In the third section, (*Rev. Stat.* p. 630,) we find it "provided, that said sheriff, or other officer, making such levy, shall, whenever the said lands are divisible, levy on such part, and so

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much thereof, as may be sufficient to satisfy such execution." The 26th section of the same act provides, that whenever the land sells for more than enough to satisfy the execution, with interest and costs accruing thereon, the overplus shall be tendered to the defendant. Thus it appears that the sheriff is directed to levy upon land enough to satisfy the execution; and if it sell for more than enough, to refund the excess to the defendant. When the levy is made, the officer cannot tell how much will be necessary to satisfy the interest and cost on the execution, especially when the day of sale may be postponed two or three times; or in case the property should not sell, or be taken by plaintiff in execution, at two-thirds its appraised value, the property should "not be offered for sale again on said execution, order, or decree, for the term of twelve months thereafter." *Rev. Stat.* p. 630, § 3. Had this sale been thus delayed, it is probable that the property levied upon, at two-thirds its value, would not have amounted to more than enough to satisfy "execution, interest, and costs." As it is impracticable for the officer to know the precise quantity of land necessary to satisfy an execution; and, as the statute clearly does not contemplate that the exact amount, only, shall be levied and sold, we are led to the conclusion, that this objection is not well founded. We believe, under this statute, the officer is authorized to levy upon land enough; and if he should levy upon, and sell a little more than enough to satisfy the execution, his proceedings are not therefore nugatory; but, in levying upon lands, the officer must be restrained by reasonable bounds; and if, in levying upon congressional subdivisions of land, there should be an excess over all execution claims, of the least legal subdivision, it should not be sold; or, if sold, such excess might be released to the execution defendant, on motion in the court below.

With a proper regard to the legal rights of the *bona fide* purchaser in this case, we cannot do otherwise than affirm the proceedings of the court below.

Judgment affirmed.

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WHICHER v. BD. OF COM. OF CEDAR CO.

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It is a matter of discretion with the county commissioners, to allow or refuse compensation to an attorney, for defending a pauper prisoner by direction of the district court.

ERROR, to Cedar District Court.

Stephen Whicher, Esq. made application to the commissioners of the county of Cedar, for compensation as an attorney under the direction and appointment of the district judge, in defending a pauper prisoner. The commissioners declined making satisfactory allowance; and the claim was submitted by agreement to the district judge, who decided that an attorney is not entitled to remuneration from the county, for such services.

Stephen Whicher, pro se. *Rev. Stat.* p. 155, § 64, provides that the court shall assign counsel to defend the prisoner, in case he cannot procure counsel for himself. The plaintiff in error having been assigned by the court, no choice was left him in regard to his rendering the service. He was an officer of the court, and in common with every citizen of the United States, was entitled to the benefit of the provisions of the constitution: "Nor shall private property be taken for public use without just compensation." (Art. 5, Amendments to the constitution of U. S.) This clause in our constitution, is only declaratory of natural law, as recognized and admitted by all civilized nations. Puffendorf's Law of Nations, Book 8, p. 116. It is due to the defendant to say, that on the first trial, this principle was fully recognized; nor was it denied by them in the district court. The question between the parties has always been, what shall be the amount of compensation? and it is hoped that this court will permit the parties to litigate their rights in their own way, so long as they limit themselves to matters pertaining to the courts jurisdiction; and that the court below be so instructed.

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The services were rendered in legal contemplation, at the request of, and for the county. The parties contracting are, the defendant on the one part, and the plaintiff on the other; both parties are competent to contract. The services having been performed, application is made for payment; the party for whom services are performed, says he will give \$25, and tenders an order for that amount. The claimant, like Oliver Twist, "wants more," and appeals to the sense of justice of the same party, for a larger amount to be given through the medium of a jury, in the district court of the same county. It is simply a matter of negotiation between the two original contracting parties, and it has never assumed any other character.

In this state of the case, the claimant insists that it is not competent for the district judge to interfere; and on pretence that no action at law will lie, decide that the claimant shall have nothing—shall not have even what the county has expressed a willingness to pay. If the party employing had taken the ground that the services were gratuitous, there might be some propriety in sustaining one of the contracting parties.

R. P. Lowe, for the plaintiff. The foregoing suggestion made by Mr. Whicher, seems to merit the particular attention of the court, as illustrating the impropriety of the court below stepping in between the parties, and dissolving a subsisting and recognized liability, and a liability which the counties of this state, and many other states have ever been deemed, (without exception, as far as inquiry has been made,) resting under, when services have been rendered for their pauper criminals. I consider the practice of assigning counsel by the court to those unable to employ for want of means, when arraigned for crime, sanctioned by the wisdom of all courts, and the common consent of the country; compensation to the counsel thus appointed has ever been acquiesced in as proper and just, until the judge of the district court broke in upon it in this case. It must be admitted that the interest and honor

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of each county, require that its pauper criminals should be defended when put on trial, and have a fair and impartial trial; the question is, whether this defence shall be made at the expense of one individual, (and perhaps he not a citizen of the county, as was the case here,) or at the common expense of the county. A pauper is fed at the common charge of the county, and it is equally right and proper that his life, and liberty, and reputation, when assailed, should be protected and preserved in the same manner, yet the court below has in effect ruled that the counsel thus appointed, shall, at his own expense, (and this sometimes is very considerable, when the venue is changed,) and without compensation for his services, defend a pauper criminal, although the obligation to do so attaches itself to the community at large, and not to the lawyer alone. This ruling of the court is unsustained by reason or precedent, and in opposition to the uniform practice of the courts every where.

J. P. Cook, prosecuting attorney, for the defendant. The plaintiff in error seems to argue this case as though the court below had, at some stage of the proceedings, erroneously interfered and assumed the province of the parties themselves; and claims, that because the defendants saw proper to allow him a reasonable compensation, to get rid of his importunities, with which he was not satisfied, but took an appeal for the purpose of getting a larger fee, and the court deciding that he was not entitled to anything, thereby erred in the decision. Now the facts are, that this is an agreed case, and the only question submitted to this court is the broad one, are the commissioners bound to pay an attorney for services of this kind? If they are, it presents an inconsistency that can only apply to this peculiar case, namely, that of a party feeing and paying the attorneys on both sides: and if this doctrine is to be the settled practice in the state, it will not be necessary hereafter for any criminal who stands indicted to employ counsel, but has only to say to the court that he is unable so to do, and request the court to appoint his own choice from among the members of the bar, (having had a previous understanding with the attor-

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ney,) thereupon the court appoints; and while the county have to pay an attorney to prosecute criminals, they are also compelled to pay attorneys to defend. There is an inconsistency about it that cannot be reconciled with common sense. It is true, our statute provides that the court shall appoint counsel for the accused when unable to obtain it otherwise; but this does not impose a duty on any member of the bar to accept the appointment: if he does accept it, there is not the same liability or responsibility upon him as though employed by the criminal himself. Neither is the attorney bound, when he accepts the appointment, to follow the case to another county in case the venue is changed, as is presupposed by the plaintiff in error.

The plaintiff in error argues the case as though it had long been a settled practice in the states to allow bills of this kind. Now, we deny any such settled practice; and this is the first instance in Iowa where an attorney has set up any such claim; and there are numerous instances where members of the profession have served in that capacity: and when an attorney appears under such circumstances, he does so as the friend of the court, and we hope the court will not establish a precedent that will compel the counties in this state to pay attorneys for their ingenuity in letting loose upon the community every renegade vagabond that may come among us, when the law compels the same counties to pay for their prosecution.

Opinion by HASTINGS, C. J. This case was submitted to the district court upon an agreed statement of facts; and the question before that court, and now pending for the decision of this court, is, whether the plaintiff has a legal right to recover compensation of the county of Cedar, for services rendered a pauper indicted for a crime and tried in said court; the plaintiff having been assigned to defend the accused by order of the court. The statute provides, that "the court shall assign counsel to defend the prisoner, in case he cannot procure counsel for himself." There is no statute providing for compensation for services rendered in such cases. If the board of com-

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missioners choose to compensate an attorney for such services, we see no objection; but this is a matter left to their discretion.

In this case, it seems the defendants allowed the plaintiff \$25, from whose decision the plaintiff appealed, and thereby determined to abide by his legal rights against the defendants.

The arguments of plaintiff in error, and the venerable authority (Puffendorf's Law of Nations) to which he refers, address themselves more properly to the general assembly, who have the power of making laws providing for the compensation which he seeks to recover.

It is not in the power of this court to make laws providing for such compensation.

Judgment affirmed.

Dissenting opinion by GREENE, J. I cannot agree with the majority of the court in deciding this case. The law expressly provides that the court shall assign counsel to defend the prisoner in case he cannot procure counsel himself. *Rev. Stat.* p. 155, § 64. When a duty is enjoined by statute, the means of enforcing it are necessarily implied, if not expressed. Where a prisoner cannot procure counsel for himself, the duty is imperative upon the court to assign counsel; and when thus appointed, it is the duty of counsel to attend as promptly to the prisoner's cause, and to advocate his legal rights with as much zeal and fidelity as though he had been retained and liberally feed by him. The same responsibility, both legal and moral, devolves upon him. A sense of duty must prompt him to bestow the same care, skill, anxiety, labor, and time upon the cause of his poor client, as though he had an abundance with which to reward his efforts. And can it be presumed, that the law imposes such labor and responsibility upon an attorney, without contemplating any remuneration?

It cannot well be assumed that the attorney need not render the service—that he need not accept the appointment. The assignment or appointment of a court cannot thus be disregarded. An attorney, as an officer of the court, is bound to obey

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its orders. It must be apparent that the law would be inoperative—could have no effect, if the position is correct, that an attorney need not accept or serve when appointed, and is entitled to no compensation; under such circumstances, what lawyer could be expected to serve? What poor prisoner be furnished with counsel?

No sound rule of construction, as I view the matter, can justify the position, that a statute may command and not be obeyed; that it may prescribe a rule and leave its performance discretionary with those upon whom it is intended to operate; that it may order a public functionary to extend certain rights and protection to a poor citizen, and afford him no power or means for bestowing them; or that it will require of a citizen arduous and responsible duties, without contemplating adequate remuneration. Laws should be construed, so as to give the most ample effect to the object of their enactment.

It is not compatible with the just and liberal policy of law, to subject a few citizens to the performance of important duties, and afford no means of compensation. When service is enjoined by law upon an officer of the court, or upon any person, reasonable remuneration is necessarily implied; and when the service is rendered in a criminal prosecution, either for or against the accused, and he is unable to pay the costs, they are ordinarily paid by the counties in which the proceedings were commenced. If clerks and sheriffs are thus paid fees for services rendered in behalf of the poor accused, why not pay, in the same way, an authorized attorney for much more responsible and important services. Besides, the poor are under the particular supervision of the county commissioners; and, if the ordinary revenue of the county is not sufficient for the support of the poor, they are authorized to levy and collect a poor tax. *Rev. Stat.* p. 498, § 13. The authorized bill of the merchant, and of the physician, is paid without a murmur; and they may or may not furnish what is wanted for the poor; how then can the propriety of paying the attorney's bill be questioned, when he is authorized by law; nay, even required to render valuable services, perhaps indis-

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pensable to the character and happiness of a poor man, and of those with whom he may be related.

That the county commissioners have the authority to allow counsel fees, in such a case, is manifestly conceded by the opinion of my brother judges. They say, "if the board of commissioners choose to compensate an attorney for such services, we see no objection; but this is a matter left to their discretion." With deference, I must say, that this view does not altogether harmonize with the balance of the opinion. Surely the commissioners cannot compensate an attorney at their discretion, unless authorized by law to do so. Can they have discretionary power to do an unlawful, unauthorized thing? If authorized to remunerate a man for legitimate services, then are they required to do so; especially when the service is acknowledged, as in this case; and conceded to be worth \$25, but not as much as counsel claimed.

Believing it also to be the intention of law to impose equal taxes, and equal liabilities upon the people, in proportion to their means, I cannot be reconciled to the conclusion that it is just or rational to impose such burdens upon a man without an adequate reward. I can but regard the judgment of the district court, and of my brothers in this case, as erroneous.

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When, by agreement, twenty days are granted a party to prepare a bill of exceptions, and within that time he presents the bill to the judge for his signature, though it was not filed with the clerk till five days after; it was held to be sufficient; and that filing the bill with the clerk was not a necessary part of its preparation.

When exceptions are taken in relation to any instrument in writing, with a view of bringing the matter before the supreme court, it should be incorporated into the bill of exceptions; but if this is not done, the instrument should be so particularly described and referred to in the bill, as to render its identity conclusive.

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ERROR, to Muscatine District Court.

On motion to reject the bill of exceptions, and strike from the record the papers therein referred to.

R. P. Lowe, for the motion.

W. G. Woodward, contra.

Opinion by GREENE, J. The defendant in error moves the court to reject the bill of exceptions in this case, because it was not prepared within the twenty days agreed upon in the entry of judgment; and to strike from the record the papers referred to in the bill of exceptions, because they are not therein copied. Though not filed with the clerk of the district court till five days after the stipulated time, it appears by the affidavit of plaintiff's counsel, that the bill of exceptions was presented to the judge at his residence in Davenport, several days within the twenty days allowed. The facts contained in the affidavit being admitted by the opposing counsel, we are necessarily led to the conclusion that the exceptions were prepared within the required time. From the language of the agreement, we cannot infer that the filing of the bill became a necessary part of its preparation; and if the words, "to prepare exceptions," imply the signature of the judge, the affidavit affords ample presumption that the judge signed the bill within the time. The bill of exceptions cannot, therefore, be rejected.

In relation to the papers referred to in the bill of exceptions, we find that the instrument marked A is not described with sufficient certainty to render its identity conclusive. It is therefore stricken from the record. The balance of the papers being more particularly referred to and described, are retained. We regard it as a safer practice, when exceptions are taken in relation to any instrument in writing, to copy the same into the bill of exceptions; (a) but if this is not done, it should be

(a) See *Reed v. Hubbard*, ante 158.

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so particularly described and referred to in the bill, as to enable the clerk, without mistake, to copy the identical instrument into the record, and to enable this court to refer to it with positive certainty. (1)

(1) Upon the final determination of this case, the judgment of the district court was affirmed. Soon after the decision, an opinion was written; but on preparing the case for publication, it was not to be found. If found in time, it will appear in the next volume.

PACKARD v. UNITED STATES.

Affidavits of jurors may be received to show that they entirely misunderstood the instructions of the court; and that fact being clearly established, the verdict should be set aside, and a new trial granted.

ERROR, to Louisa District Court.

This case was tried and brought up under the territorial organization of our courts. To a full understanding of the point decided, the case is sufficiently stated in the opinion of the court.

E. H. Thomas, for the plaintiff in error. We think the court below erred in refusing to grant a new trial, as the affidavit of Packard was offered, showing that the jury entirely misunderstood the charge of the court; which affidavit Packard offered to sustain by the affidavits of a number of the jurors. It there appears that the jury entirely misunderstood the charge of the court in this: they understood the court to charge, that if the contract of Packard with Ryan, to lease to him the premises, was separate and distinct from the subsequent promise of Packard, to be responsible for damages,

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they might put them together to support the charge in the indictment, which is, that the contract to keep said fence in repair, or be responsible for damages, was made at the same time. Now it appears, from the evidence in this case, that the first contract, to wit—to lease, &c., made by Packard with Ryan, was made April 28d, 1840, whilst the promise to stand good for damages, for want of repair, was not made until August following. So that the jury, in order to sustain the charge of perjury, were compelled to add to the original contract to lease, the promise made four months afterwards by Packard, to be responsible for damages. Had the jury below understood the charge of the court, to wit: that the evidence must satisfy them that the defendant was guilty, as he stood charged, without any implication to supply the defects of the indictment, Packard would have been acquitted; for the jury did find Packard not guilty of everything charged, excepting the solitary charge in relation to the contract to repair, or be responsible, &c. The indictment alleges that said contract, to repair or be responsible, &c., was all one, and made at the same time; the evidence is, that they were at different times. Again, all the testimony of Packard, in the prosecution against Ross Porter, which is the basis of this indictment, was in relation to his having sworn falsely as to the subsequent promise to stand good for damages, and did not allude to or touch the original contract to lease, between them. So that the verdict of guilty, in this case, was founded entirely on said subsequent promise, which promise the jury, misunderstanding the charge of the court, attached to the original contract to lease; supposing they had a right so to do, in order to sustain the indictment. All the testimony shows, that if Packard swore falsely at all, it was in relation to the subsequent naked verbal promise, to stand good for damages. We repeat, then, that had the jury understood the charge, to wit—that they must find defendant guilty as he stands charged, Packard would have been acquitted.

Ought not then a new trial to have been granted? Justice and law both required it. To sustain us in this position,

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we will refer first to *Rev. Stat.* p. 156, § 75; *Hastings v. Bangor*, 18 Maine, (6 Shep.) page 486, where the superior court says, "if an instruction be given to the jury, which leaves them to draw an incorrect impression from the facts, material to the issue, the verdict will be set aside." See also *Danes' Ab.* p. 246, § 4, and the authorities there referred to, where it is held thus: "New trial granted, though evidence on both sides, if jury misconceive the law as to what was the acceptance of a bill," &c., and sec. 5, same page: "New trial granted, because the jury misconceived the effect of an indorsement on a bill of exchange;" and also a "verdict against law, new trial granted, the jury supposing an assumpsit in law excluded by an actual subsisting contract, where an end was put to the latter." In same: "A third new trial granted, the jury mistaking the demand made on the maker of a note."

In the first cited case, from Maine Reports, the doctrine is laid down much stronger than claimed for here; for there it is decided, that if an instruction be given which may mislead the jury, a new trial shall be awarded; while here an instruction was given which actually did mislead the jury, and caused them to find a verdict against Packard, which they would not have done had they rightly understood the charge. The great object of granting new trials, is to remedy the mistakes of jurors and judges; to give an opportunity to correct errors, caused by the fallibility of man, in the administration of justice. To deny this doctrine, is to subvert the very principles of law. That the mistake in the law by the jurors, in this case, was fatal to Packard, there can be no doubt. Ought not this court, then, on the authority of decided cases, as well as principles of justice, to award a new trial? But the counsel on the other side will probably contend that the affidavits of jurors ought not to be received to impeach their verdict. We believe the authorities to be, that they can impeach their verdict, excepting in those cases in which their affidavits prove their misbehavior, such as drinking spirituous liquor, and the like, while trying a cause. This, however, is not universally so. See 6 *Danes' Ab.* 239, and authorities referred to, which say,

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"Confessions of jurors, as to their own misbehavior, may be heard on an application to set a verdict aside, and as it seems, their affidavits." See also *Smith v. Cheet*. 3 Caines, 57, which says, "Affidavits of jurors to impeach their own verdicts may be received." So affidavits of jurors are "admissible to show that a mistake has been made in taking their verdict, and that it was entered differently from what they intended." *Jackson v. Dickinson*, 15 John. 309. See also 4 John. p. 294; 5 Cow. 106, where it is held, that "affidavits of jurors may be received to show, that in making up their verdict they adopted a principle, in estimating damages, not allowed by law." See also, to same point, *Morrow v. McLennan*, 2 Penn. 918; *Sawyer v. Stephenson*, Breese, 6.

Opinion by HASTINGS, C. J. In this case the plaintiff was indicted for perjury, and found guilty as charged in the indictment, and fined one dollar, and sentenced to be imprisoned one hour.

This case is brought into this court by writ of error, and plaintiff has assigned fourteen errors. We will consider only the fifth assignment of errors, not deeming it important or necessary to pass upon the other errors assigned.

The fifth assignment is as follows: "The court below, erred in refusing to receive the oaths of jurors, in support of the affidavit of the said Packard, which affidavit sets forth that the jury entirely misunderstood the instructions of the court."

After the jury returned their verdict, the defendant filed his motion to set the same aside, and to grant a new trial; and also in arrest of judgment. And in support of his motion, assigned the reason that the jurors misunderstood the instructions of the court; filed his own affidavit of the fact, and proposed to prove the same by several of the jurors.

The defendant based his motion on many other reasons, and the court overruled the motion. Whereupon the defendant took exceptions, and embodied the evidence and motion in a bill of exceptions.

The defendant was found guilty by the jury, as he stood

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charged in the indictment, of the crime of perjury, one of the highest crimes in the criminal code ; and to punish the defendant for such a crime, the jury assessed a fine of one dollar, and imprisonment of one hour. The fine and imprisonment assessed by the jury are inconsistent with that part of the verdict finding the defendant guilty, as he stands charged in the indictment ; and although for this reason alone, the court would not be authorized to set aside the verdict of the jury, yet we may reasonably presume that the jury labored under a misapprehension of the facts submitted in evidence, or a misunderstanding of the instructions of the court ; and we think the court erred in refusing to receive the oaths or affidavits of the jurors, in support of defendant's affidavit, that the jury misunderstood the instructions of the court. It is true that courts ought not to receive the affidavits of jurors, to impeach the conduct of their fellows, but they may be received to show misconduct of the parties. *Denn, ex dem. Cheins v. Driver*, Coxe, 109. From a careful examination of the authorities referred to in plaintiff's brief, we have no doubt that in a criminal case, affecting the life and liberty of the accused, the court ought to receive the testimony of jurors as to any palpable misapprehension of the instructions of the court, as no person is so competent as the juror himself, to prove a misunderstanding of the charge of the court, especially when, as in this case, the defendant shall make his affidavit in open court, and show therein that the court instructed the jury so unintelligibly, or that the jury so misunderstood and misconstrued the instructions of the court, that a verdict of guilty is found against him, when by the law and evidence he should have been acquitted.

We are of the opinion also, from an examination of the evidence in the bill of exceptions, that defendant's motion to set aside the verdict and grant a new trial, should have been granted ; and that the majesty of the laws would suffer far less, and be much better sustained, by an acquittal of the defendant, than by encouraging the pernicious example of

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such a verdict, assessing a fine and imprisonment so inadequate to the turpitude of the crime.

We are sustained in the above opinion by the decision in the case of *State v. Hascall*, 6 N. Hamp. 352, in which the question about the testimony of jurors was fully discussed, and numerous authorities reviewed.

And therefore, the judgment and proceedings of the district court, subsequent to the plea of the defendant, and the making up the issue to the country, must be reversed and set aside, and the case remanded with instructions to award a *venire de novo*, and proceed to trial with the issue.

Judgment reversed.

CASES
 IN
Law and Equity,
 DETERMINED IN THE
S U P R E M E C O U R T
 OF
 THE STATE OF IOWA;

BURLINGTON, MAY TERM, A.D. 1848,

In the second year of the State.

Greene.	
1g	281
100	417
Greene.	
1g	281
110	877

PRESENT:

HON. S. CLINTON HASTINGS, CHIEF JUSTICE.

HON. JOHN F. KINNEY, }
 HON. GEORGE GREENE, } JUDGES

THURSTON AND WEBB v. MAURO.

A person cannot be rendered liable on a bill of exchange or promissory note, unless his name, or the style of the firm of which he is a member, is attached to some portion of it as a party.

Where W. M., as authorized agent, drew a bill of exchange to the order of P. M., for means furnished his principals, T. & W., in carrying on their business, and appended the word "agent," without stating for whom he was agent, it was held that W. M., on being released from liability to P. M., became a competent witness to prove the nature of the agency transaction; and for that purpose, that letters between him and his principal were admissible. It was also held, that as P. W. advanced the means under circumstances which justified the belief that the principals, T. & W., were responsible, and would pay the amount advanced for their benefit, he might file the bill for cancelation, and recover on the money counts.

Thurston v. Mauro.

ERROR, to Des Moines District Court.

Grimes and Starr, for the plaintiffs in error.

D. Rorer and C. Mason, for the defendant.

Opinion by GREENE, J. Mauro instituted an action of assumpsit, in the district court, against Thurston & Webb. The declaration contains a special count, averring that William H. Mauro, as agent for the defendants, drew a bill of exchange in favor of Philip Mauro, for six hundred dollars, on Thomas L. Thurston, who accepted the same; but suffered it to be protested for non-payment. The declaration also contains the usual counts for money had and received, laid out and expended, and for an account stated. The defendants pleaded the general issue. Verdict for the plaintiff.

The case comes before us upon a mutual statement of facts, recognizing a power of attorney from the defendants to W. H. Mauro, appointing him their agent to superintend, and make all necessary contracts in conducting their ferry at Burlington; also recognizing certain letters from the defendants to their said agent, and to the plaintiffs. This mutual statement, or agreement, contains the testimony of W. H. Mauro, who was rendered competent by a release of interest from the plaintiff. From these respective documents, which are made evidence in the case, we learn that the defendants were indebted to their agent for services, from twelve to fifteen hundred dollars; that said agent was authorized to contract and settle debts, draw bills of exchange, and raise funds for the payment of their liabilities and the support of their ferry; that under this authority he drew the bill of exchange in question in favor of the plaintiff, realized the amount thereon, placed it to the credit of the defendants, and notified them accordingly by transmitting an account current; that the plaintiff was advised, by letters from the defendants, that W. H. Mauro was authorized to draw bills upon them, and that they were indebted to him; that after the bill was protested, the plaintiff, as first indorser, paid the

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amount thereof to the holder; that Webb, one of the defendants, acknowledged a regret that the bill had been protested; that similar bills had formerly been drawn on Webb and honored; and that it had been arranged between the defendants that their agent was to draw thereafter upon Thurston.

It is evident that the action cannot be maintained upon the bill of exchange, and special count; as the bill is drawn in the name of Wm. H. Mauro, with the indefinite addition of "agent," and contains no designation of his principals. The doctrine is well established, that no person can be rendered liable on such an instrument, unless his name, or the style of his firm is subscribed to some portion of it as a party. But it is unnecessary to enlarge upon this point, as the principle is conceded by plaintiff's counsel.

The only question we are called upon to determine is, whether the court below erred in allowing a recovery on the common counts, under the evidence contained and referred to in the written agreement. It is claimed that a portion of the testimony tends to vary the purport of the bill of exchange, and therefore should be excluded, upon the well recognized rule of evidence, that parole testimony is not admissible to contradict or materially vary a written instrument. Upon a careful examination of W. H. Mauro's testimony, we can see no portion which tends to pervert or change the evident signification of the bill. He merely explained the capacity in which he acted, the indebtedness of the defendants to himself, and the nature of their liability to the plaintiff; and also the authority which he, as agent, possessed, to draw bills of exchange, and manage the financial and general business of the defendants, at Burlington. If the bill of exchange had not been offered in evidence in the case, we should regard the testimony of W. H. Mauro as substantially competent to support the common counts; nor can we otherwise regard it, since the bill is offered to the court for cancelation, and merely retained as a link and circumstance in the evidence of indebtedness. His testimony was clearly relevant to establish the fact of his authority to draw bills of exchange for the purpose of raising funds to pay the

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demands of others against the defendants, and also to satisfy his own claims against them. This he might do in his capacity as agent, by naming his principals in the bills, or upon his individual responsibility, by subscribing only his own name. If in the former capacity, the plaintiff's right to recover against the defendants, even on the special count, cannot be doubted; and if in the latter case, he should raise funds for the use of his principal, by signing a bill upon them in his own name, though he would thus bind himself personally to the holder, yet it is clear that the principal may also be bound in the same transaction, as a party to the contract, through his agent. Story on Agency, 270.

The agency and authority of W. H. Mauro to raise funds by bills or otherwise, to meet the indebtedness of the defendants, were not only explained by the agent to Philip Mauro, but also fully communicated to him by letters from the defendants themselves. It affords a strong presumption that it was upon the strength of this information that he was induced to indorse the draft, and virtually advance the amount for their benefit. It was this that induced and justified him in regarding the act of their agent as their act, and of holding them, rather than the agent, responsible for the means he furnished for their use.

The acceptance of the bill by Thurston, and the subsequent regret of Webb that it had been protested, amount to additional proof that their agent was authorized to raise funds for their business in that way. All this evidence, in connection with the bill of exchange, furnish a relevant combination of circumstances in support of the common counts, which might with propriety go to the jury and influence their verdict.

In deciding, under the agreement, that the plaintiff is entitled to recover on the common counts, we are not only influenced by the evidence developed in the power of attorney, letters from the defendants' bill of exchange, the testimony of W. H. Mauro, and the apparent injustice of denying such a recovery; but we also feel confident that our position is fully maintained by the recognized principles of law. It is, perhaps,

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unnecessary to refer to more than the case of *Pentz v. Stanton*, 10 Wend. R. 277. In that case, goods were furnished by the plaintiff to the agent of an unknown principal, for which a defective bill of exchange, as in this case, was given by the agent on his principal; and still it was held, that though the plaintiff could not recover on the bill, the principal was liable on the common counts, for goods sold and delivered, for his business operations, to the agent. If, without any understanding or arrangement with the principal, who was unknown to the party, and with imperfect evidence of the agent's authority, the plaintiff was entitled to recover, in a case otherwise so remarkably similar, we can entertain no doubt that the district court decided correctly, in this case, in admitting the evidence and rendering a judgment on the money counts. 4 Wend. R. 654.

Judgment affirmed.

POWERS v. BRIDGES.

The granting of a new trial is a question of sound discretion, which will not be disturbed, unless a flagrant case of injustice is made to appear.

After a final judgment has been entered, and an application for a new trial overruled, it is irregular to entertain a second motion for that object.

But after the court has granted such new trial, the plaintiff, by appearing and amending his declaration, waives the irregularity.

An instruction upon principles of law, pertinent to the issue, and responsive to the averments in the declaration, should not be refused; and the evidence, to which such instruction of law is applicable, need not be set out in the bill of exceptions.

It is not necessary for the plaintiff to prepare a deed for the defendant to execute, before he can sue for a breach of the contract to convey.

ERROR, to Des Moines District Court.

Grimes and Starr and J. C. Hall, for the plaintiff in error.
This was an action of assumpsit, to recover the value of cer-

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tain work and labor done, and materials furnished by the plaintiff, at the instance, and for the benefit of the defendant, Bridges. A trial was had at the October term, 1843, upon the defendant's plea of non-assumpsit, to the plaintiff's declaration, and a verdict rendered for the plaintiff, for two hundred dollars. The verdict was rendered by the jury on the 21st day of October, 1843, and the judgment rendered by the court on the same day. On the 6th day of November, fifteen days after the judgment was rendered and entered, as appears upon the record, the defendant filed his motion for a new trial. This motion of the defendant was granted, and in granting it we say the court erred.

We hold that no new trial could properly be granted after the rendition of the final judgment. The 20th section of the practice act, in force at the time this trial took place, declared that "if either party may wish to except to the verdict, or for other causes to move for a new trial, or in arrest of judgment, he shall, before final judgment be entered, give, by himself or counsel, to the opposite party, or his counsel, the points in writing, particularly specifying the grounds of such motion, and shall also furnish the judge with a copy of the same, and final judgment shall thereupon be stayed until such motion can be heard by the court." This statute is equally imperative upon the counsel and the court. It is first incumbent upon the party seeking a new trial to perform certain acts. Those acts are essential. They are made so by the statute, and it is required too, that they shall be performed before a certain time, or the happening of a certain event. When they are correctly performed, both as to the manner and time, then it is made obligatory upon the court to stay the final judgment until such time as the motion shall be disposed of. The supreme authority has seen fit to establish this check, for the purpose of guarding the rights of the party in whose favor the judgment was rendered, and to prevent a continuous train of litigation. Every one conversant with the administration of law, must know how exceedingly important it is that motions of this kind should be determined at as early a day as possi-

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ble, after the trial; while the facts are fresh in the remembrance of the court and attorneys, and before the party has time to range the country to procure witnesses by subornation, to swear his cause to a successful termination. These were undoubtedly some of the considerations that induced the legislature to enact the law regulating applications of this kind.

Now, in the case at bar, none of the preliminary requirements of the statute were performed. No notice of the motion for a new trial was served upon the plaintiff's attorneys, nor was a copy of the points relied upon delivered to the court. It does not appear from the record, that any such service was made, and it is inferred that none was made, because the legal presumption is, that if it was made the court would have stayed the judgment. No notice even was given in open court, and the judgment was not stayed; but after the lapse of fifteen days, the application was made for a new trial. This first motion was overruled, and on the 22d day of November, thirty-one days after the rendition of judgment, another motion was made of a similar character, and was sustained. The whole proceeding after the judgment was irregular and *coram non judice*. The statute was palpably violated by granting the new trial. If so, the plaintiff is entitled to a reversal. The case of *Jones v. Coopridge*, 1 Blackf. 47, is in point. In that case, the supreme court of Indiana decided, that where an inferior court granted a new trial for insufficient causes, the revising court will set aside all the proceedings of the inferior court, after the entry of the judgment. That case was stronger than this. There, there was an error in judgment of the judge only; here, there is a violation of the statute, and an infringement of the plaintiff's right.

2. The court erred in granting the new trial, admitting that the judgment had not been entered, and that all the proper preliminary steps had been taken. The ground for granting a new trial was, that there was newly-discovered evidence, which materially affected the case. Now, we hold that it was necessary for the defendant, that the new testimony was material to the issue; that it could not be obtained at the trial,

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and that it will be sworn to by new and disinterested witnesses. It is not enough to show that the evidence was not put in at the first trial, merely; it must appear to the court, that the party did not know of the evidence. It must be shown that the new witness was not called at the first trial; for if the witness was sworn, and was not interrogated, or did not swear as to facts within his knowledge, a court will not grant a new trial, although the party knew not that the witness knew of the undisclosed evidence. *Bond v. Cutler*, 7 Mass. 205. Now it was the duty of the defendant to cross-examine his son when on the stand, and elicit from him all the facts within his knowledge. It may be said that there is no evidence that he was sworn on the first trial. True, that does not appear upon the record, but it should appear affirmatively that he was not sworn, before the new trial could properly be granted. To enable a party to demand a new trial, all the facts entitling him to it, should appear upon the record.

It is a principle well established, that a party is not entitled to a new trial on the ground of newly-discovered evidence, if the evidence might have been obtained by a reasonable degree of diligence. *Williams v. Baldwin*, 18 John. 489. Now, it seems to me, the court will look with some degree of suspicion on the affidavits of the defendant and his son. Who supposes that the father was not possessed of all the knowledge of the facts of this case that were known by the son? Or who will suppose that he did not know everything that was known by the son? Yet he swears that he heard all of the conversation recited in his affidavit, which he must have known to be material to his father's defence, and yet kept it a profound secret, not only before, but at the trial, when he was sworn to tell all the facts within his knowledge. It seems, too, that these facts were not disclosed soon after the trial; they were smothering in his bosom thirty-one days after the trial, and until after one ineffectual attempt had been made to procure a new trial upon newly-discovered evidence of another person. Now, we hold that the defendant did not make out such a case as entitled

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him to a new trial. He did not show that the testimony was such, that he was unable to procure it at the trial.

Again : the court below erred in the refusal to instruct the jury, as desired by plaintiff's counsel. We are conscious that the statement of facts and evidence is not fully set out in the bill of exceptions ; but presume there is enough shown to warrant the court in considering it. If there is, we presume the judge who presided at the trial below will furnish the notes taken by him in aid of the facts already appearing. That he has the right to report the evidence in such cases, and that the appellate court has a right to consider the statement, see *Miller v. Baker*, 20 Pick. 285 ; Minot's Dig. 512.

It appears from the special counts in the declaration, that Powers performed a large amount of mechanical work for the defendant, for which he was to receive a deed to eighty acres of land ; Powers paying Bridges, in addition to his labor, a note drawn in his favor by R. W. Bell. The deed to the land was demanded by Powers ; but at the time of the demand he did not exhibit the note. No exception, however, was taken by Bridges because of the absence of the note ; but he excused himself from performing his obligation, and delivering the deed, by saying that he was not then ready to execute it. The parties then agreed that the deed should be executed, and it, with the note, should be delivered to a person, and at a time specified ; which third person was to hand the note and deed to the parties to whom they respectively belonged. The note was delivered by Powers, according to the agreement, but Bridges entirely neglected and refused to deliver the deed. Upon this state of facts the instructions were asked, as specified in the plaintiff's bill of exceptions, all of which were refused by the court.

The court below, in instructing the jury, ruled correctly as to the law generally. It is undoubtedly the law in New York, and everywhere else, for aught that we know, that, in ordinary cases, two demands are necessary. The party wanting the deed must demand, and wait a reasonable length of time for the deed to be executed, when another and second demand

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must be made. Of course, all cases where the execution of the deed is a condition precedent, are excepted from the operation of this rule. But as a general rule, it is true. It is for the benefit of the vendor, and a right that the law has given him. But it is a right that he can dispense with. He is not compelled to insist upon the two demands. When the first is made, he can unquestionably waive the second one, either in express terms, or by implication. I hold that the second demand was waived in this case. What more effectual method could the vendor adopt to show his waiver of the second demand than to agree himself to deliver the deed? Bridges selected a third person, to whom it was to be committed; and when he made this new arrangement with the consent of Powers, the latter was absolved from making another demand. Powers, after that, could not make a demand of Bridges, because Bridges had not agreed to deliver to him, but to another and distinct person. A demand is never necessary, and can never effectually be made unless the person making it has an immediate personal right to the thing demanded. Here, Powers had no such right, except as under the last special agreement. If, then, this be so—if there was the special agreement as to the delivery of the deed, embodied in the second instruction asked of the court, and if under that agreement Powers had no right to demand the deed to be delivered to himself, and if Bridges had the right to insist upon delivering the deed to the person agreed upon, then it follows that a second demand by Powers was unnecessary, and the refusal of the court to instruct as desired was error.

The parties, after this special agreement, stood precisely as if both demands had been made. If it was one of the terms of that agreement that the conveyance should be delivered by a certain day, then if that day passed without the deed being tendered to the person named, a right of action immediately accrued to Powers. If no day was named, then Bridges had a reasonable time to deliver it in; and what was a reasonable time was a question of fact for the jury to determine. So far as this case is concerned, it matters not whether the agree-

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ment was to deliver by a day certain or generally, because the court ruled generally that a failure to deliver will not entitle the party to recover at all. For this refusal of the court to instruct the jury, we think the judgment below should be reversed. But we confidently believe that the court will not find it necessary to examine the case, so far as to consider this last objection; for it seems to us that the erroneous granting of the first new trial must be decisive of the case.

All of which is respectfully submitted.

David Rorer, for the defendant. The first objection urged by the plaintiff, is the granting defendant's motion for a new trial, after the first trial was determined. If this was erroneous, it was waived by the plaintiff amending his declaration, and joining in issue to the pleadings thereto. If he would have availed himself of it, he should have rested his case there, and brought it up at that stage of the proceedings; by pleading over, the defendant waived his exceptions. 1 Scam. 281; 4 Blackf. 449; 1 Scam. 471.

But he not only pleaded over in this case, by amending his declaration, but actually withdrew a juror on a subsequent trial, and consented to a continuance, before putting in that amendment; by this consent, it is believed that he waived his former exceptions. But be that as it may, the subject of new trial directs itself to the sound discretion of the court below, and their opinion ought not to be disturbed, unless a flagrant case of injustice is made to appear. 1 Scam. 181 and 529.

But it has been urged that it was applied for too late, and could not be moved for after judgment entered up, or after the intervention of four days. This doctrine has originated on the rule of other courts, and is not law here. *Jackson Ex. Demise of Cobden et al. v. Chase*, 15 John. 354.

In *Lofft's R.* 160, it is said that "it is never too late to move for a new trial, on newly-discovered facts." See reference thereto in *Harrison's Dig.* 1531.

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The instructions asked for by plaintiff below, and the refusal of which is assigned for error, were wrong in point of law, and were properly refused by the court. The settled law on the subject is as follows: (I have not the authorities at hand, but have copied from the books substantially)

"A vendee of real estate, to whom a deed is to be executed by a certain day, must make demand of the deed; and after allowing a reasonable time for the drawing and execution thereof, must present himself again to receive it; but if, on the first demand, the vendor refuses (not, says it is not ready) to execute the deed, then the second demand is not necessary." See *Blood v. Goodrich*, 9 Wend. 68; *Connelly v. Pierce*, 7 Wend. 129; *Hackett v. Huson*, 3 Wend. 249; *Sheets v. Andrews*, 2 Blackf. 274; 4 *ib.* 394; 1 *ib.* 274.

And even then it is a matter of doubt whether the vendee can sue for breach of the contract, for mere neglect to convey, or want of readiness after those demands. But must he not prepare and tender a deed to the vendor, and demand that he sign it? Such is the law laid down in *Hudson v. Swift*, 20 John. 26; *Sheets v. Andrews*, 2 Blackf. 274.

Should it be objected that the cost of more than two witnesses to each fact is taxed in the judgment, under the statute, it will be seen, from the record, that it was done by consent; and the certificate of the judge to their materiality was waived by the plaintiff in error, expressly. And this being a judgment for costs, merely, that waiver ought to operate as a waiver of all prior exceptions in the cause; for so much of the judgment is actually assented to thereby, on the part of the plaintiff in error.

It will doubtless be objected, (as it was below,) that the judgment could not be set aside, and new trial granted, after the actual rendition of the judgment—that is, after it was entered; but by reference to the statute it will be seen that there is nothing in this objection. See *Rev. Stat.* 472, § 20.

That statute clearly contemplates the setting aside judgments, and granting new trials, as well for substantial causes as for irregularity; for although it requires notice to counsel

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and court before the entry of final judgment, when a new trial is intended to be moved for, and although the records may not show such notice in this case, yet it will be presumed to have been given, as the exceptions do not show to the contrary; and it is not to be presumed that the court would have acted without it. And even if not so presumed, the defendant contends that such notice is not required, when final judgment has already been entered, and is only intended to stay final judgment until the motion can be heard. And it is clear that a new trial may be had after entry of judgment, for the statute expressly speaks of setting aside a verdict, or judgment; and says it shall not be done for irregularity only, unless cause be shown, &c., during the sitting of the court; thereby clearly showing that a judgment may be set aside, and a new trial granted any time during the term, and not for irregularity only.

Defendant in error insists that it may be done on newly-discovered evidence, after the judgment is entered; that the doctrine in the books, to the contrary, is based on rules of other courts, and not on the general law; and it can be presumed that new evidence, even when in existence, would probably be discovered in so a short a period as that intervening between the return of a verdict, and the entering of the judgment, which in our courts is done as soon as the clerk can enter it up. This doctrine is only applicable to those courts where a certain number of days are required, by the practice, to intervene between the finding and recording of the verdict, and the moving for and entering of judgment. Here no time is required to intervene; then the reason of the rule ceases, and the rule itself should cease.

In *Mulford v. Shepherd*, 1 Scam. 588, a new trial was refused by the court below, and on error, ordered to be granted, though moved for after the actual rendition of judgment, and although that fact was objected against the granting of it.

It is not only a matter of discretion, but it is said that the opinion of the judge, granting or refusing it, should always have great weight. Yates' Pl. 534:

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“An exception cannot be taken to the opinion of the circuit court, in granting a motion for a new trial; it is only to a decision overruling and refusing such motion that an exception can be taken, according to the principles of the common law and the practice of the courts.” *Brookbank v. Smith*, 2 Scam. 78.

Nor can I perceive that this case is altered by our statute in any manner. It is true, that the present act provides, that “the supreme court shall have appellate jurisdiction over all final and intervening orders, judgments, and decrees of the district courts, in law and chancery, and over all questions of law that may arise in said courts, upon motions for new trials, in arrest of judgments, continuances, and to cases reserved.” Page 6 of the laws of 1844. But this statute was passed in February, 1844; and granting the first new trial, the only one assigned for error, and the only one ever granted to defendant in error, took place in November, 1843. Hence the present statute can have no manner of application to the acts of the court done prior to its passage; for this being a statute in derogation of the common law, it will not be construed to retrospect, so as to affect proceedings had before its enactment. 7 John. 477; 1 Kent’s Com. 450, 455, 456; 2 Cranch. 389; 3 Call, 268; 6 Mass. 306; 1 Blackf. 374; 2 *ib.* 76.

The defendant asks for the affirmance of the judgment, and that a *procedendo* be awarded.

Opinion by HASTINGS, C. J. This was an action of assumpsit, brought in the court below by the plaintiff in error, for an alleged violation of a contract to convey a tract of land. The defendant pleaded the general issue to the several counts in plaintiff’s declaration, and trial was had thereon on the 20th day of October, 1843. On the 6th day of November, same year and term of the court, affidavits were filed for a new trial, judgment having been rendered on the verdict of the jury in favor of the plaintiff.

On the 10th of the same month, the motion of defendant for a new trial was overruled. Afterwards, on the 22d day of the

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same month and term, the defendant submitted another affidavit for a new trial, and also another affidavit on the 27th of the same month; and on the same day last aforesaid, the court granted a new trial on the last application. To these proceedings of the court the plaintiff excepted, and has assigned the same for error.

It seems to be settled that the subject of a new trial directs itself to the sound discretion of the court, and that the opinion of the court ought not to be disturbed, unless a flagrant case of injustice is made to appear by the record. (a)

It will not be necessary in this case to settle the question raised here, whether error will lie to the decision of a court sustaining or overruling a motion for a new trial, under the statute prescribing the jurisdiction of this court.

The granting of a new trial on the 27th November was clearly erroneous and irregular. The defendant had had his day in court on a motion for a new trial; his motion and affidavits had been overruled, and it would be flagrantly unjust to permit a defendant to file a second motion for a new trial over one month after trial and judgment rendered, and sustain the same, as was done in this case.

If such practice should be tolerated, a party plaintiff would never know at what hour his judgment would be set aside, nor at what period litigation would be at an end.

But the plaintiff in this case, after the new trial was granted, asked and obtained leave to amend his declaration, and did so amend by adding an entire new count to his declaration, to which the defendant pleaded the general issue.

The plaintiff clearly waived all errors and irregularities in the prior proceeding, conferring jurisdiction upon the court by his amendment and subsequent acts, and acquiescing in the irregular acts of the court in making the prior judgment of the court a nullity.

The plaintiff contends that the proceedings of the court, in setting aside the judgment, were *coram non judice* and void.

(a) See *Warren v. The State*, ante 106.

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However this might be, had the plaintiff not amended his declaration, yet, inasmuch as the court had jurisdiction of the subject matter, and the plaintiff by his acts abandoned the judgment, it is too late for the plaintiff to question the jurisdiction of the court in rendering a judgment on the second issue. The irregular proceedings of the court, we think, were voidable only, and cured by plaintiff's subsequent acts.

We will now proceed to examine the errors assigned to the proceedings in the last trial. It appears from the bill of exceptions, that the plaintiff requested the court to instruct the jury as follows: "That if the jury find that plaintiff made a demand of the deed of defendant, and defendant promised to execute the same and deliver it at a particular place and to a person designated by the parties; and receive the note on R. W. Bell at such place from such person, when plaintiff was to have the note to be delivered to defendant; that if the jury believe that plaintiff did deliver the note to the person agreed upon, and at the place agreed upon, and defendant failed to deliver the deed at such place, that such failure of defendant rendered the defendant liable to this action; which instruction the court refused. To which plaintiff excepts."

The instruction sought seems to have been pertinent to the issue and responsive to the averments in the declaration. We see no reason on the record for refusing it.

It is urged that the bill of exceptions does not set out the evidence so as to show the pertinency of the instruction. This we think was not necessary; a principle of law was affirmed in the instruction, and the court was called upon to give the same to the jury. The principle of law alluded to in the instruction did bear directly upon the issue. Where the opinion of the court delivered to the jury presents a general principle of law, and the application of the evidence to it is left to the jury, there is no necessity of putting any portion of the evidence upon the record. *Pennock v. Dialogue*, 2 Pet. Rep. 15.

It was not necessary for the plaintiff to prepare a deed for execution, and tender the same to the defendant, before he

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could sue for a breach of the contract to convey. (a) It was sufficient for the plaintiff, having complied with the contract on his part, to make a demand for a deed, giving a reasonable time for the execution of the same, and if the defendant should refuse or neglect to make his deed at the time and place by him stipulated for that purpose, the plaintiff would then have his right of action against the defendant.

It is true in England, for reasons, we presume, peculiar to their system of conveyancing, that it is required of a vendee to prepare and tender a deed; and such is the doctrine in many of the states of this union. But we believe the more reasonable doctrine to be as above stated. See *Buckmaster v. Grundy*, 1 Scam. 313; 9 Wend. 68.

For the above reason, the judgment of the court below will be reversed.

Judgment reversed.

(a) See *Carson v. Lucore*, ante 84.

THE STATE v. MOFFETT, et al.

The statute, making it a penal offense to injure a milldam, does not take away the common law right to abate a nuisance.

An act of the legislature, authorizing B to build a dam, does not take away the right of M to abate it as a nuisance, if it caused the water to flow back upon M, to his serious disadvantage.

In abating a nuisance, no more injury must be done to the property than is absolutely necessary to effect the object.

To come within the prohibition of the statute, the injury to a dam must have been wilful and malicious. The necessary abatement of a nuisance by one's own act would not disclose such motives.

The penal statute, relative to injuries to mill-dams, being merely cumulative, it can have no abrogating influence upon the common law.

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ERROR, to Lee District Court.

David Rorer, for the state, in his argument, cited *Rev. Stat.* p. 187, § 15; 14 John. 272; 15 *ib.* 213; 5 Wend. 423; 7 Cowen, 266; 8 Caine, 307.

C. Mason and *J. C. Hall*, for the defendant, referred to 8 Hill, 261; 10 Mass. 391; 14 Wend. 250.

Opinion by KINNEY, J. The defendants were indicted for damaging a milldam.

It appears, from the bill of exceptions, that Moffett built and possessed a mill and dam on Skunk River in 1834 or 1835; that at the time of the alleged injury he was in possession; that in 1840, Peter Brener built a mill and dam on the same river, about a mile and a half below Moffett's mill, the effect of which was to throw back-water to an injurious extent on the wheels of Moffett's mills, but not so as to stop them entirely; that both mills are public mills; and on the 23d of March, 1848, Moffett and the other defendants tore down Brener's dam to a considerable degree—a space from fifty to eighty feet wide, and from one to three feet deep—with intent to remove the alleged nuisance; and justified in their defense on the ground that Brener's dam was a nuisance injurious to Moffett, and that he had a right to abate it by his own act. The prosecution asked the court to instruct the jury, that, by the 15th section of the criminal law of Iowa, "Entitled an Act defining Crimes and Punishments," the right of Moffett to abate a milldam as a nuisance, by his own act, was taken away; which instruction was refused. The court also refused to instruct the jury, that the act of the legislative assembly authorizing Peter Brener to build a dam did not take away Moffett's right to abate the dam as a nuisance. The court then instructed the jury, that if Brener's dam caused water to flow back upon the wheel of Moffett's mill to his serious injury, it was a private nuisance, and Moffett might pull it down so as to remove the back-water.

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These instructions, refused and given, are assigned for error.

The only question in this case is, whether the statute making it a penal offense to "injure a mill-dam," took away Moffett's right to abate it for a nuisance. That a person at common law has a right to abate a nuisance cannot be denied. It is one of those rights which secure to him the uninterrupted enjoyment of his person and property. When properly exercised, it may be as essential to his happiness as the right of self-defense. But like other summary rights of this nature, it is confined within certain limits. No more injury to the property of another must be inflicted than is absolutely necessary to accomplish the object. A salutary check is thrown around an improper exercise of this right, as the individual is always under the peril of being deemed a trespasser, unless the existence of the nuisance is established. Thus, while a person can be the judge, in the first instance, as to the existence of the nuisance, if it should turn out otherwise he is responsible, and can be made to answer to the party injured, and may subject himself to a criminal prosecution. But at common law, his right to abate a nuisance, when it really is such, is uncontroverted. And we think our statute has not impaired this right by making it penal to injure a mill-dam, if the mill-dam becomes a nuisance. The injury to the dam, to come within the purview of the statute, must be "wilful or malicious." The summary abatement of a dam as a nuisance, is not necessarily attended with malicious or wilful motives. It may be an act necessary for the protection and enjoyment of property.

But it is said by counsel, that as the statute is penal, it is prohibitory and general in its application to all the citizens; prohibiting as well those from injuring a mill-dam, to whom it is a nuisance, as others who are not injured by it. We do not think this position at all sound, or the conclusion drawn from a penal statute a legal case. The statute in relation to assault and battery is penal, and of universal application, and prohibitory in its nature and effects; and yet it does not interfere with any of those rights which any man has of defending his person against the attacks of others.

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If in this case Brener became the aggressor by creating a nuisance, he was the injuring party, and as such the nuisance was liable to be abated.

"That affirmative statutes do not take away the common law," is a maxim of the law itself.

There is nothing in our statute, express or implied, excluding remedies which existed before the statute was passed. One of these remedies was abatement of a nuisance; and in the absence of a statute taking this remedy away, it remained preserved.

Nor does the imposition of a penalty, by the statute, take away the right of abatement. Nothing is better settled, as a general rule, than that the addition of a penalty, by statute, for a common law offense, is merely cumulative; and that, without negative words, such statutes detract nothing from the remedies formerly allowed by law. *Renwick v. Morris*, 8 Hill, 621; *Wetmore v. Tracy*, 14 Wend. 250; *Commonwealth v. Ruggles*, 10 Mass. 399. If this is the law, and we think the books are conclusive upon the subject, then the statute did not take away Moffett's right to abate the dam as a nuisance, and the instructions of the court were correctly given and refused.

The question of title does not appear to have been raised by the evidence set out in the bill of exceptions. The exceptions state that it was in evidence, that Moffett built and possessed the mill and dam; but as the exceptions do not state that Moffett did not introduce testimony tending to prove a fee-simple title, we cannot presume that such was not the case.

Judgment affirmed.

McGuffie v. Dervine.

MCGUFFIE v. DERVINE.

Nothing appearing in the record to the contrary, it will be presumed that the officer in a replevin suit obtained a bond as required by law, from the plaintiff, before executing the writ.

When judgment is rendered for more than two witnesses' fees, it will be presumed that the certificate of the judge, that more than two were necessary, was regularly made.

Questions in relation to costs should first be adjudicated in the court below on a motion to re-tax.

ERROR, to Des Moines District Court.

M. D. Browning, for the plaintiff in error.

J. C. Hall, for the defendant.

Opinion by GREENE, J. The proceedings in this case were commenced before a justice of the peace, in an action of replevin. An appeal was taken to the district court, in which judgment was rendered against McGuffie, the defendant below. The first error relied upon is, that there was no replevin bond executed by the plaintiff to the officer, as required by the *Rev. Stat.* p. 338, § 5. This objection appears not to have been raised before the justice, or in the district court. From the fact that there is no replevin bond on file among the papers, nor referred to in the transcript of the record, it is assumed that none was given.

Before executing the writ of replevin, it became necessary for the officer to require a bond of the plaintiff. The taking of such security is prescribed in the writ, and the presumption of law is, that the officer performed his duty, in requiring a compliance with the statute. This court will presume that the constable proceeded legally, till the contrary is established. We can only act upon such errors as are affirmatively apparent in the records.

Though there is no bond on file or referred to in the transcript, it is by no means conclusive that the officer failed to

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procure one. It is no unusual occurrence for constables and magistrates to retain such instruments in their possession ; and they are seldom contained among the papers in cases of appeal ; and indeed we can see no necessity for bringing up such papers, unless some question, as to their sufficiency in substance or form, should be raised for the determination of the appellate court.

But even if rendered certain that the necessary bond had not been given, we should seriously doubt the propriety of reversing the judgment on that account. It would be an omission that could work no injustice to the party ; nor vary the verdict or judgment below. Without the bond, the defendant, if injured by the replevin proceedings, would have the same recourse upon the officer and his security, as he could have had upon the bond.

The second error relied upon is, that judgment for costs was rendered for more than two witnesses, without the certificate of the judge, as required by statute. This error does not appear affirmatively upon the record, and till it does so appear, we are to presume that the judgment for cost was properly rendered. If the party feels injured by such a judgment, he should first seek a remedy in the district court on a motion for the re-taxation of costs.

Judgment affirmed.

PATTERSON v. HARTSOCK.

P. made a note to N., payable in meats, when called for ; and on the same day N. executed a writing to P., agreeing to pay him cash for one half the meat he should purchase, and apply the other half on the note till satisfied ; the note was indorsed by N. to H., without recourse, but there was nothing to show that it was negotiated after due. Held to be a presumption of law, that the note was indorsed before due, and that the agreement from N. to P. was no defense to a recovery on the note, and not admissible in evidence.

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ERROR, to *Des Moines District Court*.

David Rorer, for the defendant. 1. This note is indorsed to plaintiff, without date, and is presumed to have come to his hands before due, and is subject to no such defense as set up.

2. It was made, as shown by the record, at Iowa territory, under the statute of 1839, p. 381. § 1, and is to be "taken to be due and payable," to the person to whom given, and is assignable by law. Defendant in error insists, that whether taken by him before or after due, yet it is valid against all secret agreements between the original parties thereto, by virtue of our statute, and by the general law. Story on Pr. Notes, pp. 210, 220, §§ 191, 192, 296.

J. C. Hall, also for the defendant, insisted that there is no error in the record and proceedings of the court below; that the evidence offered by defendant below, and excluded by the court, was not relevant; and if admitted would not, and ought not to have changed the verdict of the jury. The bill of exceptions shows that it was no part of the original contract—that it was given without consideration; that Hartsock was the indorsee before the note was due. Now, if the plaintiff in error claims that he had any farther evidence, by which he could render the evidence excluded material, or relevant, he should have shown by the record that he offered such evidence, or proposed to follow up this evidence by such other evidence as would make this material. The court will never presume anything in favor of the exception, but it is to be taken most strongly against the party taking it. *Scott v. United States*, Morris, 142. It is clear, and admitted in the argument of this case, that the evidence which was excluded, unless it was followed up by other evidence, that the defense would have been incomplete, and no bar to plaintiff's action. Can the court assume that such farther evidence was offered, or could have been produced, when the record is silent upon the subject?

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M. D. Browning, for the plaintiff in error. The court below erred in not admitting Patterson to introduce to the jury the agreement signed by Nealey, the indorser of the note, as set out in the bill of exceptions. All instruments executed by the parties to a contract, and referring to the same subject matter, tending to qualify the rights of the parties, or to explain the contract, should be received in evidence upon the trial. This is a well-established rule, and sustained by the following authorities. Chitty on Con. 85; 9 Cowen, 274; 22 Pick. 176; 10 *ib.* 302, 250; 5 *ib.* 395; 13 Wend. 114. But it is contended that such evidence cannot be introduced against Hartsock, who is the assignee of Nealey. If Hartsock took the note before due, for a valuable consideration, and without notice of the contract between Nealey and Patterson, then the testimony could not be introduced against him. But was it not competent for Patterson to show: first, that had Hartsock taken said note after due, in that case the same defense could be made, as if the note had been sued in Nealey's name; and, second, if he took it before due, that he took the same with full knowledge of all the rights of Patterson against it? And how are these facts to be proved? Why, first, by showing what the contract between Nealey and Patterson was; and then introducing the other facts to make out our defense. And how is the contract between Nealey and Patterson to be proved? In no other way than by the introduction of the written agreement executed by Nealey at the time, and then follow up the defense by proving the other facts; and testimony could not be introduced to prove the agreement, because the same was reduced to writing, and was itself the only evidence of that fact. When that agreement was excluded, no further evidence could be introduced. It was the foundation upon which all other testimony had to be based, and was really the key and entering wedge to our defense. It would be utter folly for Patterson to prove that the note was assigned to Hartsock after it became due, unless he was also permitted to prove that he had a defense against the same, while in the hands of Nealey, and that defense could

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only be proved by the written agreement of Nealey, which, being excluded, shut the door completely against any defense.

Opinion by HASTINGS, C. J. This action was commenced before a justice of the peace, on a promissory note drawn by said Patterson in favor of James W. Nealey, an indorser, without recourse, payable in meats when called for at the market price in Burlington.

At the date of the note, it appears Nealey executed and delivered to Patterson an agreement, as follows :

"I, James W. Nealey, do agree and bind myself to pay to Robert W. Patterson, cash for one half of the meat that I shall purchase of him from this date, until the same shall amount to the sum of two hundred dollars, the other half to be credited on the note which I hold against said Patterson, May 11, 1841.

(Signed) JAMES W. NEALEY."

There does not appear to have been before the court below satisfactory evidence that the note was negotiated after due, and the presumption of law being that the note came into the hands of the defendant in error before due, the court below did not err in ruling out the defense set up under the above agreement.

The paper introduced by defendant, if considered in connection with the execution of the note, and legally before the jury, we think would be no bar to a recovery. It is not a matter precedent to the payment of the note, that Nealey should advance half cash for meat purchased on the note. This undertaking of Nealey seems to be independent of the note, although made at the same time, and Nealey testifies that it was executed by him for Patterson's convenience, and did not enter into the original consideration or transaction.

The law raises the presumption that, at the date of these papers, Patterson was indebted to Nealey in a sum equal to the amount of this note.

Nealey testifies that a demand for payment of balance due.

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was made, and if the defendant would avail himself of the collateral agreement, he should have responded, by making a demand on his part; but it seems he refuses to pay the note, and does not demand performance of the collateral agreement; being then indebted, he becomes liable to pay, and the court below did not err in ruling out said agreement.

The defendant below proved by said Nealey, that the note in suit was one of the notes mentioned in the agreement, and Nealey at the same time stated, "that said agreement was no part of the transaction or subject matter of the said note, but given only for said Patterson's convenience."

The court then refused to permit the defendant to read the agreement to the jury as evidence. The plaintiff in error claims that the court should have permitted him to read the paper in evidence, as a stepping-stone to other and further evidence.

Had the bill of exceptions stated that the defendant proposed to follow up the introduction of the paper with other evidence, the position would perhaps be correct. But the bill of exceptions does not state that any other evidence was offered, and the paper being no bar to the action of itself, it was properly ruled out from the jury, there being no other evidence proposed to be introduced. See *Courtney v. Commonwealth*, 5 Rand. 666.

Judgment affirmed.

Dissenting opinion by GREENE, J. As the excluded agreement appears to have been intimately connected with, and refers explicitly to the note as a part of the same transaction, I think its relevancy clearly established; and that it should not have been excluded from the jury. To justify such exclusion, the evidence should have been manifestly irrelevant. *Shannon v. Kinney*, 1 A. K. Marsh. 3; *Granger v. Warington*, 3 Gil. 299.

The rule appears to be well settled, that evidence to be admissible, need not afford full proof of the fact which it is offered to establish; but it is sufficient if it conduces in any rea-

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sonable degree to prove the fact. *Belden v. Lamb*, 17 Conn. 441; *Haughey v. Strickler*, 2 Watts and Serg. 411; *Jones v. Van Zandt*, McLean, 596; *Platte County v. Marshall*, 10 Mis. 345. In *Lake v. Munford*, 4 Smedes and Marsh. 812, it was held not to be necessary, that evidence offered to the jury should appear at the time to be relevant; but sufficient if it so appeared during the trial. And it appears that if evidence is only relevant to the issue, it cannot be excluded, even if it is not assisted by other proof, sufficient to establish the point in dispute. *Harrell v. Floyd*, 3 Ala. 16; *Cuthbert v. Newell*, 7 Ala. 457; *Laroque v. Russell*, *ib.* 798; *Abney v. Kingsland*, 10 *ib.* 355; *Drew v. Chamberlin*, 19 Vt. (4 Washb.) 573.

Besides, the note in question was not made payable at a future day, but when "called for;" on demand, it became immediately due. 13 Mass. 181, 187; 2 McCord, 246; 3 Wend. 13; and hence the legal presumption that the note was negotiated before due, is necessarily removed, and cannot be applicable to this case.

The agreement obviously appears to have been a part of the note transaction; and is not the presumption reasonable, that it was a strong inducement—an item of consideration upon which the note was given? Without farther comment, I cannot believe that sound rules of law or justice to the plaintiff in error, can justify the decision of the court below in this case.

 AUSTIN *et al.* v. PEASLEY.

Where, upon the cross-examination of a witness, it appeared that he was security for costs of the suit, but was still permitted to testify without objection, and after the evidence in the case was closed; the cause had been submitted on a motion; and after the court had adjourned for one night; it was moved to exclude his testimony on the ground of interest; it was held that the objection came too late; that it should have been urged when the incompetency of the witness was disclosed by his evidence.

Austin v. Peasley.

ERROR, to Des Moines District Court.

This was an action of trover, commenced by Austin and others against Peasley. Verdict and judgment below for the defendant. The only objection urged to the proceeding is in relation to the exclusion of a witness's testimony; the particulars of which are set forth in the opinion of the court.

Hall and Mason, for the plaintiff in error.

Grimes and Starr, for the defendant.

Opinion by KINNEY, J. The record in this case presents but one question for our decision. It appears that a witness was sworn and introduced upon the part of plaintiffs without any objection as to his competency. Upon the cross-examination it appeared that said witness was security for costs. The cross-examination was continued and concluded, no objection still having been made on that account. Other witnesses were introduced and examined by the plaintiffs, and he rested his case. An application was then made by the defendant for a nonsuit, which was overruled. The defendant then offered to introduce his evidence, and the court adjourned until the next morning.

In the morning defendant's counsel, in the absence of the witness, moved to exclude his testimony, for the reason that he was incompetent, he being security for costs. This motion was sustained, which is the error complained of.

If the objection to the testimony had been made when the interest of the witness was disclosed, it should have been sustained, and his testimony ruled out. The party against whom a witness is introduced may place him upon his *voir dire*, to test his competency; or allow him to testify in chief, and object to his competency, when his interest becomes apparent.

But it is too late for the defendant, after passing the cross-examination with a knowledge of the incompetency of the wit-

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ness ; interposing no objection to his testimony ; and particularly by remaining silent until the plaintiff had closed and submitted his case, to move to have the testimony excluded upon the ground of incompetency. If the witness had been objected to when he first disclosed his interest, he could have been restored to his competency by a release. And another reason which goes to sustain this practice is, that a party by tacitly permitting the opposite party to close his case, without any objections to the incompetency of his testimony, and then succeeds in ruling it out, might thereby hinder him from supplying the proof by other and competent witnesses.

We think, therefore, in this case, that the court erred in ruling out the testimony.

Judgment reversed.

EDDY *et al.* v. WILSON *et al.*

Where the record of a case is silent relative to the circumstances under which a non-suit was rendered, as to one of the defendants in an action on the case, it will be presumed that the court acted properly.

In an action, *ex delicto*, where there is no evidence against a defendant, or such deficient evidence, that the court would be justified in setting aside the verdict, the court may order a non-suit without the consent of plaintiff.

If a plaintiff goes to trial on two counts of a declaration containing four, he abandons the other two counts ; and should not afterwards object to the action of the court in sustaining a demurrer to them.

ERROR, to Henry District Court.

This was an action of trespass on the case, commenced by Eddy and Sewell, against R. and J. Wilson and Henshaw, to recover damages for injuries sustained by the plaintiffs, upon the dam of the defendants, in navigating the waters of Skunk

Patterson v. Hartsock.

river with a flat boat. Issue was joined on the first and fourth counts of the declaration; and a demurrer sustained to the second and third. These counts aver among other things, that by an act of the legislative assembly of the territory of Iowa, authority was given to Robert Wilson, his heirs and assigns, to erect a dam across Skunk river, upon condition that it should be so constructed as to contain a convenient lock of stated description, for the passage of steam, keel, and flat boats; but that he built the dam without such a lock, and in consequence, in attempting to navigate the river with their flat boat, it struck upon said dam, and sunk with all the loading. As the sufficiency of these counts was not particularly decided upon by the supreme court, it is not necessary to quote them in detail. The objection alleged as cause of demurrer was, the second and third counts do not show that the defendants, J. Wilson, and Henshaw, were either the heirs or assigns of R. Wilson, or were in any way bound to put a lock in the dam. 2. They do not set forth sufficient cause of action against the defendants. 3. The declaration does not show the plaintiffs' right to navigate the river; nor aver that it was or is, a navigable stream, or public highway. 4. The counts prove the plaintiffs to be trespassers upon R. Wilson's mill-dam. The record does not show upon which of these grounds the demurrer was sustained. Upon trial on the other two counts, after the evidence on the part of the plaintiff was concluded, the court directed a non-suit as to Henshaw. A verdict of not guilty, and judgment in favor of the other two defendants.

M. D. Browning, and D. Rorer, for the plaintiffs.

J. C. Hall, for the defendants.

Opinion by HASTINGS, C. J. A question is raised in this case as to the power of the court below to order a non-suit in an action on the case, as to one of the defendants. The record states that after the evidence on the part of the plain-

Porter v. Sigler.

tiff was concluded, the court directed a non-suit as to Henshaw. As to whether the non-suit was ordered on the motion of one or all of the defendants ; or by consent of the plaintiff, or of the counsel of all parties ; or whether the plaintiff objected to the order of the court, or what reasons there were for directing the non-suit, the record is silent. If the plaintiff objected to the non-suit, he should have made his objection manifest on the record. In the absence then of record, we will presume the court below did right, and if necessary, that both parties consented and requested the court to discharge the defendant.

But we believe it will not be necessary to presume so much to sustain the action of the court. If in an action *ex delicto*, the court find there is no evidence against a defendant, or if the evidence be such that the court would not hesitate to set aside a verdict, for reason that the evidence did not sustain the same, we think the court may order a non-suit without the consent of the plaintiff. Otherwise, a co-defendant could be deprived of all witnesses.

Such an order is said to be no infringement of the declaration of rights, which secures the privilege of trial by jury. *Perly v. Little*, 3 Greenl. 97. For the exercise of such power see 1 Paine and Duer's Prac. 540 ; 1 Wend. 376 ; 3 Greenl. 5 ; 1 Wend. 379.

We think the court did not err in sustaining the demurrer, and that by going to trial on the first and fourth counts, the plaintiff abandoned the second and third counts.

Judgment affirmed.

PORTER v. SIGLER.

Parole testimony is admissible to explain the inducement and circumstances of a record entry made by mutual consent, where such evidence has no tendency to contradict or vary the record.

Porter v. Sigler.

*ERROR, to Henry District Court.**Hall and Mason*, for the plaintiff in error.*D. Rorer and J. W. Woods*, for the defendant.

Opinion by GREENE, J. This was an action in the district court against the indorser of a promissory note. The record in a previous suit against the maker of the note was introduced, to show that a continuance had been granted by consent of parties, in order to affect the question of diligence. The court in this case admitted parole proof to explain why the continuance was had "by consent," as stated in the record, by showing that the cause could not have been reached for trial at that term of the court. This admission of parole proof was objected to, and is assigned as error; upon the assumption that it would be contradicting and varying the record. If the evidence offered could have such a bearing, the proceeding could not be otherwise regarded than erroneous. But we cannot see how this rule of evidence can apply to the case before us, as the testimony steers clear of the principle. It is, in no particular, incompatible with the record (14 John. R. 211); it neither adds to nor changes its legitimate construction. It is corroborative of the fact that the continuance was granted by consent of parties; and only collaterally explains the inducement and circumstances of the mutual arrangement. The evidence was not to contradict, but to explain the record. The question as to the sufficiency of the testimony to show due diligence in pursuing the maker, though adverted to by counsel, does not arise; but it may not be improper to observe, we are clearly of the opinion that parole evidence could properly be introduced in such a case to establish that fact. The following authorities show the propriety of admitting explanatory parole evidence under more questionable circumstances than are presented by this case. *Barmore v. Jay*, 2 McCord, 371; *Olmstead v. Hoyt*, 4 Day, 436; *Cave v. Burns*, 6 Ala. 780; *Turney v. Goodman*, 1 Scam. 184; *Herrick v. Bean*, 2

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App. 51; *Chamberlain v. Dover*, 1 Shep. 466; *Trafton v. Rogers*, *ib.* 315; *Justice v. Justice*, 3 Iredell, 58; *Williams v. Ingell*, 21 Pick. 288; *The State v. Matthews*, 9 Port. 370; *Carmony v. Hooper*, 5 Barr, 805; *Dice v. Yarnel*, Morris, 241.

Judgment affirmed.

Dissenting Opinion by KINNEY, J. I regret that I am placed in a position which compels me to dissent in opinion from my brethren of the bench, in the decision which they have made in this case. If I entertained any doubts in relation to the conclusions to which I have come, and the principles of law which have led me to those conclusions, the confidence which I have in their superior legal abilities would induce me to agree with them in affirming the judgment.

The only question involved in the case is, was the testimony of Woods properly received by the court, to explain why a continuance was had by consent. The introduction of the testimony was objected to, the objection overruled, and the testimony allowed to go to the jury, to which a bill of exceptions was taken, which is the alleged error. It appears from the record that Porter was the holder and payee of a certain promissory note, calling for three hundred dollars signed by W. L. Tool. This note was assigned by Porter, on the 29th day of October, 1844, as follows: For value received, I assign the within to M. Sigler, with the understanding that it is not to be sued for twelve months. Upon the 16th day of March following suit was brought in the Louisa district court, by Sigler against Tool; and at the June term the parties appeared, and by consent the cause was continued. At the succeeding term judgment was obtained against Tool, and execution issued and returned; no property found.

Suit was then instituted against Porter, to charge him as assignor, and on the trial was the witness Woods introduced to show why the cause was continued by consent.

It is a principle of law, well settled, that due diligence must be used by the assignee of a negotiable instrument before he can succeed against the indorser.

Porter v. Sigler.

At the term of the court for judgment against Tool, the parties appeared, and continued the cause by consent.

It has been urged by counsel for defendant in error, that, for aught that appears of record, Porter himself might have consented to this continuance. To explain the fallacy of so violent a presumption, it is only necessary to inquire who were the parties to the suit. Were they strangers to the record? then, whose names do not appear as such? or were they those who were litigating the suit? to wit, Sigler as plaintiff, and Tool as defendant. Instead of being left to doubtful conjecture, or unreasonable presumption, we have the unerring certainty of the record, from which we learn who the parties were that consented to the continuance.

It appearing then of record that the cause was continued by consent of the parties, Sigler seeks to show, by parole, why he consented to the continuance, and thus to preserve or restore his remedy against Porter, as assignor. If the cause had been tried at the first term, and judgment obtained against Tool, it is not improbable that the money might have been made, and Porter thus relieved from his liability as assignor. As such, Porter certainly had a right to have the note prosecuted to final judgment at the earliest possible day; and unless Sigler shows a legal excuse for not using the diligence required by law, Porter, as assignor, could not be liable.

The question then recurs, was the testimony of Woods properly admitted to explain the record, by showing why the cause was continued? and did the court err in permitting Woods to swear that consent was given, because the parties thought the cause could not be tried at that term of the court?

I can come to no other conclusion than that the record could not be so explained. It speaks for itself. It was its own interpreter. It contained no ambiguity which required parole testimony to render it intelligible. It was his own record, introduced by himself in support of his action, which he seeks by parole to explain. To tolerate a practice of this kind, we must first discard and condemn all that sanctity with which the law has clothed a record evidence, imparting to it a verity

Doolittle v. Bridgeman.

upon which secondary evidence is not permitted to encroach. A practice so alarming and dangerous in its consequences, would not only, in my opinion, conflict with the well-established principles of law, but open a wide door for assignees to come into court and excuse themselves for not pursuing that diligence which the law so greatly requires for the interest and protection of assignors. Again, the witness does not swear that there was not time to try the cause, but merely because the parties believed at the time that the cause could not be reached. Thus making himself the judge in determining the amount of business that could be accomplished by the court; and the conclusion is made the basis by which to excuse himself for his own *laches* and neglect.

Without farther referring to the impropriety and manifest injustice of having parole testimony to explain record entries, I will only add, that if my position is not correct, I have the satisfaction of knowing, that as the majority of the court are against me, my opinion will be harmless, and work no injustice to the parties in future litigation.

Doolittle *et al.* v. BRIDGEMAN AND PARTRIDGE.

1g 265
j129 304

Where D. and C. each furnished a moiety of the money to purchase a quarter section of land from the United States, for the benefit of C., and to secure the payment of the money which D. had advanced towards the land, it was purchased in his name in trust for C., and soon after C. died, without having obtained a deed for the land; it was held that the heirs of C. had, in equity, an unquestionable right to the undivided half of the land; but that, as the estate of the deceased was insolvent, it should be subjected to the payment of his just debts. Held also that the trust in which D. held the land could not be changed by an averment in his answer, not responsive to the bill, that he had executed a bond to C. after the original purchase of the land, binding himself to deed it to C., upon his paying the amount he had advanced within a stipulated time, or in default forfeit

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the land; and that it was accordingly forfeited. Held also that the conveyance of the land to P., the mother of C., was void, as against his creditors; and she being administratrix of the deceased at the time of the conveyance to her, that it should be held by her as representative of the estate, and as subject to the demands of creditors as if owned by the testator at the time of his death. Held also that D. and P., having had title to the quarter section of land, and having disposed of one half of it to third persons, the remaining half, held by P., should be subject to the claims of creditors and heirs.

IN EQUITY. By writ of error, under territorial laws, to Des Moines District Court.

A bill in chancery, filed by Bridgeman and Partridge against Philinda Donaldson and William Phinney, administrators, with the will annexed of Calvin Donaldson, deceased; and also against A. Donaldson, A. Marten, and A. Doolittle.

The bill sets forth that C. Donaldson became indebted to the complainants on three promissory notes, amounting, with interest, to about \$458; that, after the time of executing the notes, he made his last will and testament, by which, after bequeathing sundry legacies, he devised to his mother, the said Philinda Donaldson, as his residuary legatee, all the residue of his property, real and personal; and that soon after making the will he departed this life, the latter part of January, 1841, and thereupon letters of administration were granted to said P. Donaldson and W. Phinney. The bill charges, that the said letters testamentary were illegally granted to them; as the will had not been legally proved, and the security taken was wholly insufficient to secure the creditors in a faithful administration of the estate, and in the payment of their several dividends arising therefrom; and also charges that they were administrators in their own wrong; that a considerable amount of property, including notes and accounts, belonging to the estate, had come into their hands, and a large portion disposed of and collected by them; and that the proceeds had been illegally wasted in paying pretended legacies, or appropriated or converted to their own use, without paying the debts honestly due by said estate, in defraud of complainants and other

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creditors. The bill then avers that C. Donaldson, before and at the time of his death, was the equitable owner of certain real estate, or of some part thereof, to wit: the south-west quarter of section thirteen, in township seventy, north of range three, west, containing one hundred and sixty acres, in the county of Des Moines; that the land was purchased from the United States in the name of Amizi Doolittle, but in fact for the use of said Calvin Donaldson; and that the administrators well knew the interest which the estate had in said quarter section of land; that said Calvin had paid either the whole or some part of the purchase-money for the land, and had borrowed the residue of said Doolittle, permitting him to take the title in his own name by way of security, subject, however, to redemption; and that Doolittle held it in trust for the exclusive use and benefit of said Calvin, who, previous to his death, had paid off and discharged all that was due on the bond, excepting from three to six dollars, which had since been paid by the administrators, or one of them; and that they had fraudulently procured the said Doolittle to make a deed in fee to said Philinda Donaldson, in her individual right, when the same was held in trust, and should have been conveyed for the benefit of said estate, to satisfy the just claims of creditors. The bill also charges that Philinda, further to injure and defraud complainants, as creditors of the estate, confederated with one of the defendants, Alonzo Donaldson, and conveyed to him the north half of the quarter section of land, without adequate consideration, &c.; and that he subsequently conveyed the same to Abner Marten, and that the same was done by the parties with a knowledge of the facts and circumstances before charged. The bill concludes with a prayer that the administrators, in case they have legally administered, be decreed to disclose all assets belonging to said estate that had come into their hands, and arrange the same for distribution, and to have their distributive share set apart to them; and, in default thereof, they pray for a decree against the administrators, as in their own wrong for the amount of their debt; that the land before described be sold, and sufficient of the proceeds applied to the

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payment of their demand; that the defendants be decreed trustees of the land for the benefit of the creditors of the estate, and that the deeds referred to be cancelled, and decreed fraudulent and void, as against the creditors of the estate.

Answers were filed by the respective defendants. The opinion of the court sufficiently shows in what particulars these answers deny the allegations of the bill, and what facts were established by the evidence in the case.

The court below decreed the sale of the south half of the quarter section to satisfy the claim of complainants; and A. Doolittle and P. Donaldson were decreed to pay the costs of the suit. The bill was dismissed as to the other defendants.

Hall and Mason, for the plaintiffs in error.

David Rorer, for the defendants.

Opinion by HASTINGS, C. J. It is evident from the bill, answers, testimony, and exhibits in this case, that the lands described in the bill of complaint were purchased of the government with the funds of said Doolittle and Calvin Donaldson, deceased. Doolittle furnishing one half of the purchase-money, and Donaldson, deceased, the other half, the land having been purchased in the name of Doolittle. Donaldson then, at the time of his decease, owned one undivided half of said land, the naked legal title to the same being in Doolittle, his trustee. The right of Donaldson's heirs to his moiety of the land, is as unquestionable in a court of equity as it would have been had Doolittle made a declaration of his trust, and conveyed the same to Donaldson before his decease. It cannot be reasonably doubted, we think, that aside from any subsequent arrangement between the parties and the subsequent acts of Doolittle after the death of Donaldson, that the one half of said tract of land should be subjected to the payment of Donaldson's just debts, the estate of the deceased being insolvent. It is set up in the defense, that the trust was changed by a subsequent contract between Doolittle and

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Donaldson in his life-time. Doolittle, in his answer, avers that he executed a bond to Donaldson, obligating himself to convey the whole of said tract of land upon the payment of \$120 by a time agreed and stated therein, and that if Donaldson did not pay the said sum of money at the time specified, he should forfeit to Doolittle his interest in the land. It is not averred that Donaldson executed the bond and bound himself to forfeit, or did any act by which he obligated himself to incur such a penalty other than by accepting the bond. Is the averment in Doolittle's answer of the existence of such a contract, testimony? It clearly would be, if it had been responsive to any charge in the bill. The bill does not aver that such an outstanding contract existed, nor seek discovery of the contents of the same. If then the defendant choose to set up such a contract to avoid the effect of the discovery sought, and to change the trust, or to destroy the same by the forfeiture claimed, we believe it was incumbent on him to prove such contract. If such a bond ever existed, Doolittle could have procured the same from his co-defendants, who are the administrators of the estate of said Donaldson, or prove its destruction or loss, or prove its contents, or at least have stated his inability to do so. That portion of the bond, providing for a forfeiture of Donaldson's half of the land, is so unreasonable and contrary to the ordinary mode of transacting business among men, even if that part of the answer averring the same had been strictly responsive to the bill, it would be received as evidence of but little weight. But if we grant that such a bond existed, we do not see how it will affect Donaldson's original interest in the land. The terms of forfeiture will not be enforced by a court of equity, as equity will not countenance a transaction by which one party claims eighty acres of land, because the other party had failed to purchase another interest in land and pay for the same as he had agreed. Doolittle, it seems, after the death of said Calvin Donaldson, in consideration of love and affection, being a brother, conveyed the said tract of land to one Philinda Donaldson, the mother, heir, administratrix, and residuary legatee of the said Calvin Donaldson,

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deceased. Mrs. Donaldson claims in her answer, that the land was conveyed to her in her own right, and that she can hold the same in that right, as against the creditors of the deceased. We have come to the following conclusions on the transactions set up here to defend against the complainant's bill by the defendants :

1. That the conveyance of Doolittle to Philinda Donaldson, for the consideration specified, is void as against the creditors of the deceased.

2. From the fact that the deceased had no real estate inventoried by the administrator of his estate, and in his will devised real estate to the said Philinda Donaldson, and from the testimony of witnesses, and the answers tending to show that both the said Philinda and the said Calvin Donaldson in his lifetime considered the land in question his land, we cannot doubt the testator intended in his will to devise the said land to his mother.

3. Such being the intention of the testator, the said Philinda being the heir and administratrix, and the conveyance being voluntary, we must consider the conveyance to Philinda made to her as a representative of the testator, Calvin Donaldson, and that the lands are held by her as subject to the demands of creditors, as if the lands had been owned in fee by the testator at the time of his decease.

4. The defendants, Doolittle and Mrs. Donaldson, having had the title of the land, and having disposed of the one-half of the land to third persons, we conclude they intended said remaining eighty acres as the share of the lands belonging to the testator's estate, and, as such, subject to the claims of the heirs and creditors.

That portion of the decree, therefore, of the court below, decreeing a sale of said eighty acres as therein specified, is affirmed ; and any portion of said decree inconsistent with this opinion, is reversed, and a decree will be entered in this court accordingly.

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DOOLITTLE v. SHELTON.

lg	271
136	98
lg	271
1142	80

A writ of error may bring up a judgment rendered by default, and extends to all final and interlocutory orders, judgments, and decrees of the district court.

No original matter not connected with the proceeding, or acted upon by the court below, will be adjudicated in the supreme court.

ERROR, to Des Moines District Court.

David Rorer, for the motion.

J. C. Hall, contra.

Opinion by GREENE, J. Defendant's attorney moved to quash the writ of error, because judgment below was rendered by default. However conclusively the case of *Colden v. Knickerbocker*, 2 Cowen, 86, supports this position in the court of errors in New York, we cannot regard it as sufficient to reverse the established practice in this court. Under the statute of 1844, p. 6, a writ of error extends to any judgment rendered by the court below. The jurisdiction of this court is extended by statute "over all final and interlocutory orders, judgments, and decrees, of the district courts." Though rendered by default, it is nevertheless a judgment, and as such, may as properly come under appellate revision, as any order or judgment in a contested case. It is clear, however, that no original matter; no question which does not appear by the record to have been connected with the proceeding below, can be acted upon by the supreme court.

Motion denied.

Doolittle v. Shelton.

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Doolittle v. Shelton.

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Motion denied.

lg	271
128	88
lg	271
1143	80

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DOOLITTLE v. SHELTON.

In a proceeding by attachment, under the statute, when the defendant has not been served with process, the judgment should be *in rem* only, and not *in personam*.

Decisions of our territorial supreme court will not be disturbed, unless manifestly erroneous.

Though the supreme court may give such a judgment as the district court should have rendered, it will not be done, when the defendant has not had a hearing below.

ERROR, to *Des Moines District Court*.

Hall and Mason, for the plaintiff in error, cited *Wilkie v. Jones*, Morris, 97.

David Rorer, for the defendant. The third cause of error assigned seems to be the only one relied on by plaintiff in error; to support which, reference is made to the case of *Wilkie v. Jones*, Morris, 97.

1. The defendant in error contends that the adjudication in the case cited does not apply to the case at bar, as it was there decided that the defendant, Jones, was not legally in court; the cause having been disposed of at a special term, intervening before the regular term, to which the newspaper notice pointed.

2. That if intended to be as broad in its effect as claimed for it by plaintiff in this case, then the decision was obviously wrong; and as it is not authority binding on this court, should be disregarded.

It is not binding authority on this court, as the supreme judicial tribunal of a sovereign state; the court that rendered it being only the temporary court of a mere colonial dependency, or local corporation. It should only be respected so far as found to be in accordance with the principles of law.

In support of the allegation that the case cited from Morris' Reports was erroneously decided, if intended to establish the principle, that in no case of attachment terminated without

Doolittle v. Shelton.

personal service, a judgment *in personam* can be entered; defendant in error refers to the case of *Miere v. Bush*, 3 Scam. 23, where it is said that the plaintiff in attachment is entitled to the usual judgment, which is general, etc., but that execution is to go against the property only.

Opinion by KINNEY, J. This was an action of covenant commenced by Shelton against Doolittle by an attachment *in rem*, and judgment was rendered *in personam*. The error assigned and relied upon by plaintiff is, that the court rendered judgment against the defendant *in personam*, when it should have been against the property attached only.

The statute, after prescribing the manner of publication in cases of attachment, where service has not been had upon the defendant, states that if the defendant do not appear as therein required, the final judgment thereupon entered shall be conclusive, so far as regards the property attached. *Rev. Stat.* p. 81, § 24.

We think this statute clearly defines the rights of the parties, and prescribes the duty of the court in the rendition of judgments in cases of attachments, when the defendant has not been served with process.

The plaintiff resorts to his remedy by attachment. Service is not had upon the defendant, and the statute we think has wisely confined the plaintiff to his own remedy, by limiting him to a judgment against the property attached. If he were permitted to take his judgment against the person, great injustice might be done to the defendant, who has not had any opportunity of making his defense.

In the case of *Wilkie v. Jones*, Morris, 97, the same point involved in this case has been decided, and as we think correctly. Although the decisions of the territorial supreme court are not conclusive authority in this court, yet we are not disposed to disturb them unless clearly erroneous, and more particularly those decisions made upon questions growing out of the statute, settling principles by which parties have been governed in their business relations.

Gregg v. McCollock.

But it is urged by counsel for defendant in error, that if the judgment below was erroneous, yet this court can render such a judgment as the court below ought to have rendered. (a) The statute has clothed this court with such discretion ; but in this case where the defendant, by the nature of the remedy, has not had any opportunity of making a defense, it might do great injustice to exclude him from making his defense, which would be the result of rendering such a judgment as the court below ought to have rendered.

Judgment reversed.

(a) See Laws of 1844, p. 9, § 81.

GREGG v. MCCOLLOCK.

A payment made by the maker of a note to the payee, after it was transferred, and of which the maker had knowledge, cannot be allowed as a set-off in an action on the note for the use of the holder.

ERROR, to Des Moines District Court.

An action of assumpsit on a promissory note, by Hugh McCollock, for the use of Andrew Snyder, against Azariah Gregg. By consent of parties, the cause was tried by the court without a jury. The defendant offered a receipt against the note, signed by Hugh McCollock, which states: "Received of Azariah Gregg, one hundred and thirty-five dollars, which amount I agree to have credited on a note I hold against him, and signed over by me to Andrew Snyder, February 25, 1846."

The plaintiff objected to the introduction of the receipt. The court allowed it to be read ; but decided that it was not sufficient to entitle the defendant to a credit for the amount,

Woods v. Mains.

unless it was followed by proof that Snyder had received the money from McCollock; or that he was authorized to receive the money, as Snyder's agent. There being no farther proof, the court gave judgment for the plaintiff.

M. D. Browning, for the plaintiff in error.

Grimes and Starr, for the defendant, cited *Hickok v. Labussier*, Morris, 115; *Sater v. Hendershot*, *ib.* 118, 122.

Opinion by HASTINGS, C. J. The question presented is, whether a payment by Gregg, the maker, to McCollock, the payee, after the transfer of the note to Snyder, for whose use the suit is brought, can be received as an offset to the note.

It is evident, from the record, that Gregg knew when the payment was made that the note was transferred. The payment then, to McCollock, was no payment on the note, unless he was the agent of Snyder. The equitable rights of Snyder must be protected against any acts of McCollock, unauthorized by him.

Judgment affirmed.

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The mischief existing at the time of the enactment, and the remedy intended, are to be taken into consideration in construing a statute.

Under the laws of Wisconsin and Iowa, previous to the statute of frauds of 1840, judgments did not operate as liens upon real estate.

The sixth section of "An act to prevent frauds," extended to all valid judgments previously rendered in the supreme and district courts, and gave to every such judgment, *in esse* at the date of its approval, as effectual a lien upon the real estate of the judgment-debtor as subsequent judgments.

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could. This section also extends to operative judgments rendered within the limits of Iowa, under the territorial governments of Michigan and Wisconsin.

A judgment not a lien upon after acquired estate.

It is not the province of the court to decide upon the sufficiency of testimony pertaining to the facts in a case; nor to order the jury upon the facts to find for either party. The instruction should be exclusively limited to the law of the case.

ERROR, to Des Moines District Court.

Grimes and Starr and L. D. Stockton, for the plaintiff in error. The following points and authorities were submitted by Mr. Stockton:

1. Judgment in district court, Des Moines county, (*Dyer v. English*) rendered June 19, 1838.
2. Execution issued thereon, and returned, October 6, 1838. Returned November 26. Second execution issued January 28, 1843, and returned.
3. English bought the land of U. S., October 28, 1839.
4. Iowa statute relating to judgment liens, was approved January 16, 1840.
5. English conveyed the land to Mains, April 20, 1840.
6. Sale on execution, May 10, 1845.

Purchaser's title at sheriff's sale relates back to the time of his judgment, so as to cut out intermediate incumbrances. *Conard v. Atlantic Insurance Company*, 1 Peters, 443. Purchaser's title at sheriff's sale takes effect from the date of the judgment. *Smith v. Allen*, 1 Blackf. 24.

At common law, judgment between subject and subject related back to the first day of the term in which it is recovered, in respect of the lands of the debtor, but not as to his goods and chattels. 3 Blacks. Com. 420, 421.

Judgment lien at common law. At common law, a judgment-creditor could only have satisfaction of the goods and chattels and present profits of lands of his debtor. Lands were exempt on feudal principles. The writ of *elegit*, which subjected one-half the debtor's lands, given by 2 Statute of Westminster (18 Ed. I. c. 18), gave the creditor the possess-

ion of one-half the debtor's lands, which he had at the time of the judgment rendered. 3 Blacks. Com. 419. This statute did not expressly give the lien, but the courts have, in order to protect their own judgments, uniformly construed them to be liens, "from the power to take the lands in execution." The lien grows out of the right to issue the writ of *elegit*, (by which the lands are taken in execution); and is, consequently, inseparably connected with that right. Ch. J. Marshall, in *Scriba v. Deanes et al.* 1 Brock. 170; same in *U. S. v. Morrison*, 4 Peters, 136. See 4 Ohio Rep. 94, for language of writ of *elegit*.

At common law, the judgment bound the land from the first day of the term at which it was rendered; 2 Tidd's Prac. 967; and the 16th sec. of the Eng. Stat. of Frauds (29 Charles II. c. 3,) limited the lien as against purchasers *bona fide*, for valuable consideration, to the day the judgment is signed. 2 Saund. 8 I. to 8 K.; Tom. Law Dict. p. 713.

By the laws of Wisconsin and Iowa, under the writ of *fieri facias*, lands may be taken and sold, and the sheriff's deed conveys the complete title to the purchaser. If, at common law, the title of the creditor and purchaser, under the writ of *elegit*, extended back to the date of the judgment, and bound the lands of defendant in the judgment from that date, how much more should the judgment lien and the purchaser's title, under a *fi. fa.*, (after lands were subjected to sale under the latter writ) extend back to the date of the judgment, and bind the lands of the judgment-debtor from that date. Will not the court even, independent of our statute of January 16, 1840, construe its judgments to be liens, under the right to sue out a writ of *fi. fa.*, and sell the whole of (instead of one-half under an *elegit*) debtor's lands? The courts in England, and in this country, have construed judgments to be liens, in consequence of the right to sue out the writ of *elegit*, "and take the lands of defendant in execution," in language of Ch. J. Marshall. There has been no repeal of the common law in this respect in this state, under the laws of Wisconsin or Iowa, nor even while the laws of Michigan were in force here. (The

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law of Michigan is not in derogation of the common law, as claimed by defendant, Mich. law, § 2, p. 424). The lien from the date of the judgment still continues, unless expressly taken away by positive enactment. It cannot be reasonably contended, that by the right to seize the whole of the land and sell the fee simple, the lien of the judgment is taken away. If the remedy is extended, the lien is extended and enlarged. So far as the right to enforce the judgment is extended, the lien goes with it.

In none of the New England states are judgments liens. 4 Kent's Com. 434. In some of them, as Massachusetts, land is not taken and sold for payment of debts. *Ib.* 434, Notes. But in the following states they are liens: New York, New Jersey, Delaware, Maryland, Ohio, Indiana, Missouri, Tennessee, South Carolina, Georgia, Alabama, and Louisiana. In Illinois, judgment is a lien by statute. In North Carolina, in a qualified sense by common law. In Virginia, by virtue of the right to sue out the *elegit*, and take the lands in execution. In Kentucky and Mississippi, judgment is a lien only from delivery of execution. 4 Kent's Com. p. 434. This lien is not affected by the failure of the judgment creditor to proceed on his judgment, until a subsequent lien had been obtained and carried into execution. *Rankin v. Scott*, 6 Cond. 504, 12 Wheat. 177. The lien of judgments in England was never given by any statute, but, as Chief Justice Marshall says, arose in consequence of the right to take the lands in execution (1 Brock. 170) and sell the same. The *elegit* gave the right to sell one-half the debtor's lands, and take possession of the same. If the *fi. fa.* gave the right to take the whole, it took away no lien previously existing, but enlarged the same.

The judgment binds after purchased lands. 1 Tomlin, Law Dict. p. 713; Sugden Vendors, 340; *Stow v. Tift*, 15 John. 464.

Ridgely v. Gartrell, 3 Har. and McHen. 450; *Calhoun v. Snyder*, 6 Binney, 138, was overruled by the subsequent case of *Richter v. Selin*, 8 Serg. and Rawle, pp. 425, 440.

Roads v. Symmes, 1 Ohio, p. 142, was governed by the

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statute of Ohio, and has been doubted and limited by the subsequent case of *Stiles v. Murphy*, 4 Ohio, p. 92.

In no other states of the union have the courts decided that judgments do not bind after-purchased lands. The courts of the only two states where such decision has been made, when the cases have been reviewed before them, have expressed their dissatisfaction with such decision; but as it had become a rule of action and law of property, they refused to disturb it. In Ohio, the decision is declared to be in virtue of the statutory law. 4 Ohio, p. 93, 95.

As to the construction of the statute of January 16, 1840: if the common law was in force, the judgment was a lien from the first day of the term at which it was rendered, according to the legal fiction that the whole term was but one day. By this statute of Iowa, as by the English statute of Charles II., the lien which existed at common law is restrained to the day on which it is rendered. The statute of Charles II. was not in force, because passed after the time which has been fixed, by general consent, as the date when the English statutes are in force in this country. See 1 Kent's Com. 473.

The 6th section of our statute of frauds has relation to three subjects:

1. What judgments are to be effected? 2. Against whom are they to be liens? 3. In what place are they to be liens?

There can be no obscurity arising as to the proper answer to these questions, when it is considered that the statute is partly in affirmance of and partly to change the common law. So far as this 6th section affirms the common law lien, there can be no question but that it extends back to the date of the judgment; and to give it such a construction is not to give it any retrospective effect to destroy vested rights, because the law was so before. Independent of that, Mains (the defendant's) right to the land did not commence until April 20, 1840; while the plaintiff's rights commenced June 19, 1838, when judgment was rendered; and the law was approved January 16, 1840, and was in force thirty days afterwards.

1. The judgments to be effected are, "Judgments in the

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district and supreme courts." Was not Dyer's a judgment in said district court?

2. The judgment is to be a lien "against the real estate of the person or persons against whom such judgment shall be rendered." The words, "shall be rendered," do not qualify or limit the lien to those judgments to be rendered thereafter, because the words are only intended to apply to "the persons" intended to be affected.

3. The judgment is to be a lien "in the county in which such judgments may be rendered." And here, also, the words, "may be rendered," are to qualify and limit only the place where the judgment is to be a lien. At common law, the judgment was not only a lien in the county of Westminster, but in all other counties of England. By this statute the lien is confined to the county in which the judgment is rendered.

The rules of English grammar, if applied to these words, will plainly show that they are not in the future tense, but in the present, and convey the idea of, and apply to judgments then in being. We do not seek to give the statute a retrospective effect, because it does not affect any prior right in this case; no right in Mains, the defendant, being shown prior to his deed. All the rights of the plaintiff can be secured, without violating any of the settled rules of construction of statutes. If Mains's deed had been executed before the statute, and the plaintiff had relied on nothing but the right given by it, (the statute), he would be seeking to give the statute a retrospective effect. But the statute must be construed according to the law in force at the time, and by such rule, if the judgment was a lien before by the common law, Mains cannot in any respect complain, if the construction we claim is given it. See 1 Swift's Dig. 11, 12.

Dyer's judgment was before the passage of the statute, and we cannot do otherwise than presume that it was passed with reference to all judgments then existing, and the remedy which the creditor had at the time for carrying them into effect. It has never been decided that the legislative power may not enlarge the remedy; to do so, is contrary to no rule

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established to regulate the construction of statutes; it is in conflict with no constitutional provision. The plaintiff has the right to presume, that when Mains took a deed for the land on the 20th April, 1840, he knew of the act of the legislature, passed January 16, 1840, and of the judgment rendered in favor of *Dyer v. English*, in the district court of Des Moines county, on the 19th June, 1838. The statute required these judgments to be entered in alphabetical order in the judgment docket, a public record book, in the clerk's office; and imposed a heavy fine on the clerk if he did not so enter it. We cannot doubt that the 28th section of the practice act of January 25, 1839, re-enacted in the practice act of February 10, 1843, was passed with reference to the fact that judgments were liens at common law, and all purchasers were bound to take notice of them. See Statutes, p. 474, § 27.

As to the last instruction given by the court of its own motion, the plaintiff in error refers the court to sec. 35 of the practice act—Statutes, p. 475. "The district court, in charging the jury, shall only instruct them as to the law of the case." In this case the court took upon itself to adjudicate the whole case—both the law and the facts; and such a course was erroneous, and for such error the judgment should be reversed.

As to *scire facias* to revive judgment, after execution once issued, within a year and a day, see 2 Tidd. 1155; 13 Serg. & Rawle, 148; *Thorpe v. Fowler*, 5 Cowen, 446; 2 Paine and Duer's Practice, 286.

As to effect of judgment rendered under the laws of Wisconsin, while this country was part thereof, see Organic Law of Iowa, § 2.

The laws of Wisconsin still continued in force after the separation of Iowa, until altered, modified, or repealed. If these laws continued in force, the judgments obtained under them are still in force, either under the laws of Wisconsin, or other laws enacted in their stead by the law-making authority. The mere change of sovereignty cannot invalidate any rights or privileges previously in force. Such a principle has never before, to our knowledge, been seriously contended for.

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But if the judgment was not a lien at common law, and if under our statute it was not made a lien from the rendition of the same, no good and sufficient reason can be alleged why the judgment was not a lien from the time our statute took effect, thirty days from Jan. 16, 1840. Mains's deed bears date, April 20, 1840. Previous to that time he had no right in the land. The taking effect of the lien under the statute would be liable to such objection as is taken by defendant to our first position, that the statute should be strictly construed, and should have no retrospective effect. All the plaintiff's rights are established before Mains's rights commenced. That judgments already rendered in the district court, and judgments thereafter to be rendered, should be placed on the same footing, was certainly within the reason of the statute, and may be reasonably taken to have been within the intention of the legislature. What valid reason can be given why part of the judgments of the district and supreme courts should be liens from a certain date, and all rendered before that date should not be liens? When there is no question as to the legislative power, the legislature may be fairly presumed to have done that which a reasonable interpretation of their language warrants us in concluding they intended to do. Such an interpretation of the act of Jan. 16, 1840, if the one previously contended for by us is decided by the court to be incorrect, would carry the lien of the judgment back to a period prior to the inception of Mains's rights, and prior to his deed of April 18, 1840. This would be sufficient to justify the court in reversing the judgment below, and awarding a new trial.

D. Rorer, for the defendant. The judgment under which plaintiff in error claims, was rendered on the 19th of June, 1838, by the district court of the territory of Wisconsin, sitting in Des Moines county, some fifteen days before the act of congress took effect, which created the territory and the district courts of Iowa.

At that time, the only statute law, as to the lien of a judgment, in force here, is to be found in the Michigan code,

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p. 423, § 2: "That all lands and tenements, as well as the goods of the debtor, shall be bound from the time they are seized in execution." This statute virtually repealed the common law on the subject, as also the statute of the British parliament, giving the writ of *elegit*. Therefore, whether the lien of a judgment referred to in the earlier books was given by the statute of *elegit*, that is, arose out of it, as contended by defendant in error, or existed at common law, prior to the passage thereof, as is contended by plaintiff in error, is not material to this case; for by the Michigan statute, the matter is fixed, and the land is only bound from the time the same are seized on execution. This statute of Michigan repealed the remedy by *elegit*; for it provided a new remedy by subjecting the lands to sale under execution. See p. 426, § 8.

This statute of Michigan, then, repealed all laws making judgments a lien on lands, and fixed the lien from the levy; and there was no statute reinstating the judgment lien, until the act of the Iowa general assembly, of the 16th of January, 1840. This statute cannot retrospect in its action. See *Dash v. Van Kleeck*, 7 John. 477; 1 Kent's Com. 450 to 456; 3 Call, 268; 2 Blackf. 76; 2 Cranch, 389.

Moreover, the statute of the 16th of January, 1840, giving the judgment lien, says, judgments of the district courts of Iowa territory, (and not of Wisconsin,) are to be liens, &c. The defendant in error, not denying the power of the Iowa authorities to execute the judgments of Wisconsin, remaining in the borders of Iowa, does nevertheless deny that those judgments were made liens by the act of January 16, 1840, for that statute innovates on the common law, and such statutes are to be construed strictly. See 1 Wash. Va., p. 72, as a leading case on the subject.

Admitting, then, that this lien law is to be construed strictly, and by the very letter of it, reference can only be had to the courts of Iowa.

The first statute of Iowa, subjecting lands to sale for debt, (for they were not so subject at the common law,) was approved January 25, 1839. See Laws of 1839, p. 197, § 1. This

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statute gave no lien, nor is there any evidence of any levy under it, or the old Michigan statute above referred to, of the laws in question, prior to Mains's deed, so as to cause said lands to be bound as by the second section of the Michigan statute, p. 424.

Having a right to levy a thing, and thereby binding it to pay a debt, and there being a lien without levy on the thing itself, are different things. The prior right we admit, but deny the latter. The prior right, plaintiff in error did not exercise until the land was deeded, and ceased to be the property of the debtor.

Lastly. Defendant in error claims, that plaintiff below showed no legal right or title by his deeds. They were not, nor had they then been acknowledged and recorded, as is required by our statute. Some of the acknowledgments were made during the trial; the papers show it; and the deeds, or part of them, have been re-recorded since. See *Rev. Stat.* p. 209, § 31. "No such instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof."

Now, plaintiff's deeds may be good enough between Wells and himself, but not as against us. That even if Wells took a good title by the sheriff's deed, as assignee of Woods, that title is not in the plaintiff, so as to enable him to oust the defendant.

H. W. Starr, for the plaintiff. The sale in this case to Wells, under whom Woods claims, passed a title from a date prior to the deed to Mains's, which is dated April 20, 1849. 8 Ohio, 65; 1 Blackf. 22, 24.

At first, in England, judgments could not be collected by sale of lands; but the statute of West. 2, gave a right to sue out execution against one half of the debtor's lands, (called an *elegit*,) if the plaintiff chose to do so.

And since that time, the courts in England, and this country, have held that a judgment is a lien on so much of the lands as you can sell by execution. In the language of Justice

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Marshall, in 1 Brockenborough, 170. "The courts have inferred a lien from the power to take lands in execution." See also Sugden on Vendors, 340, 488, § 4; 2 Saund. 8 K; 2 Tidd. 967; 4 Pet. 124; 8 Serg. 440; 4 Ohio, 94; 1 *ib.* 143; 15 John. 457.

The above authorities show that a judgment, without any statute law to that effect, has ever been held a lien on lands; and also on after-purchased lands, and against *bona fide* purchasers. The cases in 1 Ohio, and also in 6 Binney, decided that judgments were not a lien on after-purchased lands; but in 8 Serg. & R. 460, the court say that the decision in 6 Binney was made on some usages and circumstances peculiar to Pennsylvania. And they say, farther, "that the rule that judgments were not a lien on after-purchased lands," was an innovation and not an improvement. The court in 4 Ohio, 94, at the conclusion of their opinion, admit that the doctrine of 1 Ohio, 143, that a judgment was not a lien on after-purchased lands, was an innovation; but they say it has become a rule of property in Ohio, and they therefore think it wrong to change the rule.

The result, then, of the above authorities is, that judgments bind lands, not because there is any statute making them liens, but because the courts of England have the power to sell lands by execution called *elegit*, and we, of the United States, to sell by *feri facias*; and that they bind after-purchased lands, and against *bona fide* purchasers.

English bought the land in controversy from United States, Oct. 28, 1839. The execution law then in force, was the law of Iowa, of Jan. 25, 1839. See Iowa Laws, 1838, p. 197.

This law authorized the sale on execution of "the lands, tenements, and hereditaments, and any title or equitable right to lands, whether under a certificate of or from any land-office, or a title bond from any person for a warranty deed, or any right whatever to the possession of lands."

Now, Ch. Justice Marshall says, the lien is inferred from the power to sell lands. The lien then is coextensive with the power to sell, and therefore, under the above law, attached

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upon the fee simple; and that too whether the patent had issued, or there was only a certificate from a land-office.

The judgment of Dyer then, on the 28th of Oct. 1839, became a lien on the land in controversy. The record shows that executions issued on this judgment within a year and day, Oct. 6, 1848; and also Jan. 28, 1843. It is held in 6 Cond. R. 505, that a lien is not lost or destroyed by delaying to execute it.

This judgment of Dyer then, was in full life and force on the day of sale on execution to Wells, and we claim as an incident and consequence of the judgment, the sale relates back to the time when English became the owner of the land in controversy.

The doctrine that the judgment could not be a lien, because it was a judgment of Wisconsin, is too weak and too revolutionary to require an answer. It became by the organic law, and by the general rules of government, a domestic judgment. The change of government did not change the rights of person and property. It was a mere change of sovereignty and government; and Iowa took everything of property and rights which Wisconsin left, as a part of the property and rights of Iowa. It was a mere substitution of new officers in place of those who had left. The judgment was then a judgment of the district courts of Iowa, as much as Wisconsin. Any other rule would deny the power of an Iowa court to carry out and enforce by execution a judgment rendered in the territory of Iowa, while that territory was part of Wisconsin.

But again, suppose we had no lien by the judgment on English's lands in 1839, and that a judgment cannot by virtue of the statute of frauds of Iowa, of Jan. 16, 1840, be a lien on after-purchased lands. Yet does not that law operate on the judgment of Dyer, and make it a lien from the taking effect of that law on the lands in the county which then belonged to English.

The court would not, of course, give such effect to the law, against a *bona fide* purchaser from English, prior to the passage of that law; but as between English and Dyer, can

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there be any doubt that that judgment became a lien, Jan. 16, 1840, or when the law took effect? Certainly, such is the proper construction of that law, if the court follow the rules of construction, as established by the courts, and laid down in 1 Swift. Dig. 11, 12; and the rules of grammar, which show the words "may be" to be in the potential mode, and having no reference to time. The judgment then became a lien by the statute, when it took effect, (say Feb. 16, 1840.) Mains purchased two months after this, and took subject to the lien. This construction of the statute, then, is not giving it a retrospective effect; but only making it operate *in presenti*, on things as they exist, and without divesting any vested right, or relating back a single day.

But the counsel for Mains have insisted in their brief, though they did not do so in argument, that the deed to Wells, or from Wells to Woods, have not been acknowledged and recorded, so as to have any effect against Mains.

It is answer enough to this, to say that the record does not show that the deed from English and wife to Mains was ever recorded at all; and therefore he had no pretence of title to set up as against Wells, whose deed was duly recorded. The court below then erred in their refusals, and we submit.

Opinion by KINNEY, J. This was an action of right brought by Woods against Mains, to recover the following tracts of lands:—The north-west quarter of the north-west quarter of section thirty-five, the north-east quarter of the north-west quarter of section thirty-five, the north-west quarter of the north-east quarter of section thirty-five, the north-east quarter of the north-east quarter of section thirty-five, and the north-west quarter of the north-west quarter of section thirty-six, in township number seventy-one, north of range four west. Plea denying the right of Woods to recover, and verdict for the defendant.

From the bill of exceptions taken to the instructions given, and refused by the court, it appears that the plaintiff introduced evidence tending to show that the defendant was in pos-

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session of the lands in controversy on the day of issuing and service of process; and to show title in plaintiff, gave in evidence a judgment in the district court of Des Moines county, in favor of William T. Dyer, and against Levin N. English, rendered while it was Wisconsin, which was read from the original record book of said court, and rendered on the 19th day of June, 1838; by which it appears that a judgment was rendered in favor of said Dyer, against said English, for the sum of \$59 93, besides costs of suit. The plaintiff then introduced in evidence an execution, issued upon said judgment, bearing date the 19th day of March, 1845, together with the levy return and receipt thereon, from which it appears that the sheriff had made, upon a *fi. fa.*, November 26, 1838, the sum of \$23 32.

Said execution was levied on the 25th day of March, 1845, upon the east half of the south-west quarter of section twenty-five, the north half of section thirty-five, and the west half of the north-west quarter of section thirty-six, in township seventy-one north, and range five west, as the property of said defendant, Levin N. English. The said lands, so levied upon, were sold on the 10th day of May, 1845, to Purley Dunlap, as the agent of said Woods, the plaintiff; and thereupon said Woods, as attorney for the plaintiff, Dyer, receipted to said sheriff in full for said judgment. The plaintiff also offered in evidence a certificate of the sheriff, made in pursuance of said sale to him as the purchaser, and an assignment of said certificate by him made to one Wells. It also appears from the evidence, as set out in the bill of exceptions, that a sheriff's deed was duly made by the sheriff of Des Moines county to said Wells by virtue of the sale of said land; as also a deed from said Wells to the plaintiff, and to L. D. Stockton, James W. Grimes, and Henry W. Starr; as also a deed from said Stockton, Grimes, and Starr to the plaintiff Woods. The plaintiff then introduced evidence showing that two executions had been issued upon said judgment, one of date October 6, 1838, the other of January 28, 1843. The certificate of the register of the land-office was then read in evidence, from

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which it appeared that said English purchased from the United States the land in controversy, on the 28th day of October, 1839.

The defendant then offered in evidence, for the purpose of showing title in him to the land in question, a deed from said English and wife, made and executed on the 20th day of April, 1840, which was duly acknowledged and recorded, and from which it appears that said English conveyed to said defendant, Mains, the land in controversy. The defendant also proved that he had been in possession of the land since 1838; and the case was submitted to the jury, the plaintiff asking the court to give the following instructions:—

1. That the act of Iowa, approved January 16, 1840, making judgments of the supreme and district courts liens on the real estate of defendants in said judgments, operated upon the judgment given in evidence, and made the same a lien at law on all lands in Des Moines county, the title to which was in the name of the defendant, English, on the said 16th day of January, 1840. Which instruction was refused.

2. That the judgment given in evidence was a lien on the lands of English in Des Moines county, prior to and at the date of the deed from English and wife to Mains, offered in evidence by defendant, which bears date the "20th April, 1840," but which the court refused to give in terms; but gave the same with this qualification: "But not such a lien as would effect the fee simple in Mains."

3. That the sale and sheriff's deed given in evidence relate back to the commencement of the lien, and passed to Wells the real estate of English, sold by the sheriff from that time, unless defendant has shown that the lien was lost or extinguished prior to such sale. Which was refused.

4. That the judgment given in evidence in this case was a lien on all the lands of defendant, English, lying in the county of Des Moines, from the date of the judgment until the judgment was satisfied, or lien removed, or displaced by some future act done or committed, so as to prevent alienation by defendant in the judgment. Which the court refused to give in

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terms ; but gave with the following qualification—but not such a lien as would affect the fee-simple title in a purchase from defendant during such lien.

The court then instructed the jury of their own motion, that the plaintiff in this case has not shown that in law he has any valid subsisting interest in the land described in the declaration, and the jury should therefore find a verdict for defendant.

These refusals to instruct, and instructions given, are assigned for error.

In approaching the various important questions presented by the bill of exceptions, and raised by counsel in this case, we do it with great diffidence. But we have been materially aided in coming to a conclusion satisfactory to a majority of the court, by the great ability with which the important principles applicable to judgment liens, the sale and transfer of real property, and the construction of statutes, have been discussed by the respective counsel.

The instructions of the court, as set out in the bill of exceptions, raise three important questions :

1. The doctrine of liens, and to what extent, at common law, judgments were liens.
2. The construction and effect of the statute of frauds of Iowa of 1840, and its applicability to the judgment against English.
3. Whether a judgment can bind lands purchased and acquired by the judgment-debtor posterior to the rendition of the judgment against him.

It is contended, with great apparent confidence, by the counsel for the defendant in error, that neither at common law nor by our statute, was it enacted at the time of the rendition of the judgment, nor at the time the land was sold on execution, that the judgment was not a lien upon the lands purchased by Mains of English and wife. It is also urged with great ability that the statute of frauds of 1840 could not affect the judgment against English, as the judgment was rendered anterior to the passage of that statute ; and to give it such effect would

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be not only to make it retrospective in its action, but that it would also thereby become a lien upon lands purchased by the judgment-debtor subsequent to the rendition of the judgment.

At an early day, in England, as has been correctly said by counsel, judgments could not be collected by sale of the lands, as they were exempt upon feudal principles. The statute of West. 2, creating the writ of *elegit*, by which the possession of one half of the land was sold, was enacted; and the courts held that, although the statute did not create a lien, yet from the power of the courts to enforce the collection of its judgments, it was a lien upon so much as was within the scope of the writ to execute and sell.

In the absence of statutory enactments at a later period, both in England and in this country, it has been held that judgments were liens upon lands. 2 Tidd. Pr. 967.

In the language of Chief Justice Marshall, the courts have inferred a lien from the power to take lands on execution. 1 Brock. 170. This doctrine appears to have grown out of the nature and properties of the judgment itself, and the execution to enforce its collection, and its utter imbecility without so essential a quality. This principle seems to have been so universally recognized by the courts in England and this country, that it became ingrafted into, and formed a part of the common law of the land.

Since the statute of frauds of West. 2, creating the writ of *elegit*, and the various acts of parliament since that statute, and the apparent necessity of statutory provisions in this country, most of the states of the Union have passed statutes upon the subject of liens, with provisions peculiar to the statutes of the respective states.

At the time the judgment was rendered against English, the Michigan code was in force: Iowa then forming a part of, and being under the jurisdiction of Wisconsin. By the provisions of that code, all lands and tenements, as well as the goods of the debtor, were bound from the time they were seized in execution. Mich. Code, p. 424, § 2.

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Iowa assumed a territorial form of government in July, 1838. On the 25th day of January, 1839, the territorial legislature passed an act subjecting real and personal estate to execution. Laws of 1839, p. 197. This act subjected real and personal estate to be levied and sold upon execution.

In neither the Michigan code nor in this statute, is there any express provision making judgments in the district and supreme courts liens. Judgments then, at common law, under the writ of *elegit*, only being liens inferentially, arising out of the power of the courts to collect them, these statutes did not materially change or alter the common law. But the statute of frauds, of 1840, enlarged the common law by directly making judgments liens.

This statute provides "that judgments in the district and supreme courts of this territory shall have the operation of, and shall be liens upon, the real estate of the person or persons against whom such judgments may be rendered from the day of the rendition thereof, in the county within which such judgments may be rendered."

Does this statute apply to judgments in *esse* at the time it took effect, or relate exclusively to those thereafter to be rendered? If it operates upon then existing judgments, the judgment against English comes within its provisions.

In Swift's Digest the following rules are laid down for the construction of statutes: "The common law is to be regarded, and three things are to be considered—the old law—the mischief—and the remedy: how the old law stood at the time of making the act; what the mischief was for which the common law did not provide; and what remedy the statute had provided to cure the mischief." By the aid of these rules, we have but little difficulty in placing a construction upon this statute satisfactory to a majority of the court.

The writ of *elegit* in Engand, and of *feri facias* in this country, seized the property, but the judgments upon which they issued were only liens, by virtue of the power of the courts to enforce the collection of their judgments.

The Michigan code, and the law of 1839, being silent in

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relation to liens, the common law remained undisturbed. What then was the mischief to be remedied? and what was the remedy provided by the statute of 1840?

At the time this statute was passed we had just entered upon our territorial existence. Iowa was assuming a business and commercial importance, commensurate with the great and growing enterprise peculiar to the west.

The government lands were brought into a market, and the people for the first time were becoming the fee-simple owners of the soil. Judgments had been rendered in the district and supreme courts of the territory, at a time when there were not any lands on which they could be liens, the title being in the general government.

These judgments, as against real estate of the judgment debtors, having been obtained when they did not, and could not, possess any title to lands, were in many instances nugatory, and comparatively void. At common law, nor by statute, up to the statute of 1840, they were not liens upon lands purchased by the debtors, after the land came into market, and hence creditors were almost or quite remediless.

Under this peculiar state of things incident to the early history and settlement of Iowa, of which the court will take judicial notice, was the mischief, and therefore the necessity of providing a remedy by which these judgments should become liens.

Irrespective of the mischief intended to be cured by the statute, and the necessity of a remedy for which the old law did not provide, we would not do violence to the language of the statute, by giving it a construction applicable to all judgments unsatisfied at the time it took effect.

Judgments in the district and supreme courts shall be liens upon the real estate of the person or persons against whom such judgments may be rendered, &c. To construe this statute as referring exclusively to judgments *in futuro*, would not only be forced and ungrammatical, but such a construction would defeat the object of the legislature in the remedy intended. If they had so intended it to have operated, it is not

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unreasonable to presume that they would have used the words, judgments hereafter rendered in the district court, &c., instead of using language which applies as well to judgments in *esse* at the time, as future judgments.

The judgment against English was in full life and force at the time this statute took effect. English at that time was also owner of the land in controversy. The land was in the county where the judgment was rendered; as such we think the judgment clearly became a lien, by virtue and force of the statute. In adopting this construction, and coming to this conclusion, we nevertheless cannot recognize as sound law, that judgments will bind after-acquired land. (a)

This appears to have been a controverted question in England and the United States, and at this day it cannot be said to be well settled. Different and apparently conflicting decisions have arisen in the courts, occasioned, probably, to a great extent, in consequence of the peculiar phraseology of the various statutes.

The case of *Stow v. Tift*, 15 John. 457, cited by plaintiff, was a case decided upon the statute of New York; and although a majority of the court appear to encourage the doctrine, that judgments will bind after-acquired land, yet Chief Justice Thompson dissented from the decision. The question before the court was, whether a widow could be endowed of lands when the seizin of the husband was but for an instant, and passed from him *eo instanto* he acquired it. But the case of *Calhoun v. Snider*, 6 Bin. 135, and the case of *Roads v. Symmes*, 1 Ohio, 142, as also the case of *McDonald v. Murphy*, 4 ib. 94, all tend to establish the principle, that judgments will not attach to lands acquired after the rendition.

If then, in these older states, where great facilities have been extended to creditors for the collection of their judgments, by statutory provisions, this doctrine has not obtained, we know no good reason for its doing so in this state; and particularly

(a) See *Harrington v. Sharp*, ante 181; also the dissenting opinion of Judge Hastings in this case.

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as the decisions of our supreme courts have not been opposed to it.

Neither is it necessary to impart any such life to the judgment against English, to render it a lien upon the land in controversy. It is true that he purchased it from the government after the judgment was obtained; but it is equally true that he had not transferred it when the statute took effect, making all judgments at that time liens upon all lands owned in the counties by the debtors, where such judgments were rendered. Neither is the statute retrospective in its action. It operates on judgments in being at the time of its passage.

At the time this statute took effect English owned the land claimed by plaintiff. Mains did not purchase until some months after; and he is presumed to have done so with a full knowledge not only of the existence of the judgment, but of the statute.

If the defendant had bought the land prior to the passage of the statute, no construction could have been given it, to have affected him. In that case, English would have become divested of his title, and therefore the statute could not create a lien, it operating to make judgments liens upon lands of which the debtor was seized at the time of its enactment.

Therefore we think the court erred, by not giving the first instruction contained in the bill of exceptions.

It has been urged to the court, with much force, by the counsel for the defendant in error, that, as the judgment was rendered against English antecedent to our change into a territorial government, the statute could not affect it; that it could only affect such as were rendered in the district and supreme courts of Iowa. We do not think this position well taken. Section 15th, of the organic law, enacts, "that all suits, process, proceedings, &c., shall be transferred to the district courts established in Iowa."

If, by the organic law, judgments rendered when Iowa was Wisconsin were transferred to the district courts of Iowa, and thereby became judgments in said courts, we think they

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are as much subject to the statute as if originally rendered in the courts of Iowa. That judgments were transferred, we think there cannot be any doubt. With the construction we have placed upon the statute, this objection loses much of its apparent weight.

The instruction given by the court, upon their own motion, we think erroneous.

It was the duty of the court to instruct the jury upon all questions of law; but it was alone the peculiar province of the jury to find a verdict upon the facts, under the instructions of the court upon the law. In this case it appears that there was a large amount of testimony before the jury, pertaining to facts—the execution of documents, and other instruments of writing, which presented questions for the consideration of the jury; and the court went too far in ordering them to find a verdict for the defendant. *Rev. Stat.* p. 475, § 35.

In this country it comports well with the genius and policy of the government to extend great latitude to trials by jury, and an innovation upon that policy ought not to be tolerated by courts of justice.

The other questions raised by the bill of exceptions, and assignment of errors, are substantially disposed of by the decision upon the first instruction.

Judgment is therefore reversed, and a new trial awarded.

Dissenting opinion by HASTINGS, C. J. While I concur with the majority of the court in the main points settled in this case, I find myself arriving at a very different conclusion.

The judgment against English was rendered in the year 1838, a period when there was little of any real estate within the present boundary limits of this state owned in fee by the people who then inhabited it.

The first, and I think the most important question to be settled is, whether the judgment against English attached to, as a lien, after-acquired lands. Under the laws then in force, the plaintiff had a right to his execution against the real and personal estate of the defendant. There was no statute then

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in force, that has been brought to our notice, which gave the judgment creditor a lien upon the real estate of the defendant, without execution and levy; and no law giving a judgment the property of binding the estate of the defendant, but the common law, modified by the acts of parliament of Great Britain.

By the common law of England, judgments did not attach on real estate, on account, it is supposed, of the feudal tenures by which all the real estate in England was holden at one time. In proportion as the feudal system gave way to the more enlightened and liberal spirit of the age, creditors, who always had a controlling influence, succeeded in procuring the enactment of the statutes of Westminster, 2—13 Ed. I., which gave the creditors the possession of one moiety of the debtor's lands, which he had at the time of the judgment rendered. Because the parliament had put this power into the hands of the creditors, the court of common law immediately erected thereon judgment liens, under pretence that the doctrine originated from the power to take the lands in execution. The lien is said to grow out of the right to issue the *elegit*. *Scriba v. Deans*, 1 Brock. 170.

I can see no reason for such an inference; it appears to be an unauthorized, arbitrary rule, which no court ever should have adopted—a violation, it appears to me, of all correct rules of construction of statutes, adding to an act of parliament, without authority, a power to make judgments bind real estate in the hands of innocent *bona fide* purchasers without notice. By the same arbitrary decisions, the lien is made to retroact, and exist days before the judgment is rendered; and the lien would probably have yet existed, but for the interference of the 16th section of the English Statute of Frauds, 29th Charles II. chap. 3, which provided that such liens as against purchasers, *bona fide*, for valuable consideration, should be limited to the day judgment was signed. Thus did this doctrine originate; and having been impliedly sanctioned by subsequent acts of parliament, and especially the last act mentioned, and having been universally conceded to

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exist ever since, and coming with our ancestors to this country, and being engrafted upon our systems of jurisprudence as a part of the common law, it would seem to be rash, if not unwise, to question this right of lien wherever the English common law prevails; or that the right to seize lands of a defendant, on execution, exists either by *elegit* or other final process. If there had been no statute in force regulating writs of execution at the time of the rendition of this judgment, I should agree with the court below in limiting the lien; but there were statutes providing for the sale of defendant's land, imparting to the purchaser the title in fee. The *elegit* did not exist, but a more powerful process was substituted; the lien did not depart with the *elegit*, but was extended with the writ of execution to the title in fee of all the lands of defendant. The same reason which caused the origin of this lien, will extend its power from a moiety of the lands of defendant to the entire real estate liable to execution. The judgment, then, at the day of the rendition thereof, possessed the property of binding all the real estate of English, owned in fee, within the jurisdiction of the court which rendered it.

It is argued by plaintiff in error, with much ability, and apparently supported by high judicial authority, that this judgment bound the estate of English, subsequently acquired, and consequently attached to the premises in controversy. Inasmuch as the plaintiff had his right to execution on lands subsequently acquired, and as the lien originated in the right to issue the *elegit* in the first place, so it is contended it extended to, and attached upon, the right to execution on subsequently acquired estate. If the decisions creating a lien, in the first place, were founded in reason, it would be but reasonable that the lien should be thus extended; but as this decision was arbitrary, and engrafted as law upon an act of parliament under mere pretence of construing the meaning and giving effect to the same, and as some of the American courts have repudiated this doctrine, and as much confusion appears to exist in the English cases as to the right of this lien, and as there appears to be no sound reason in making

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such extension of the lien in this country, I concur with the majority of the court in the opinion, that judgments do not attach as liens upon the real estate of the defendant, acquired after its rendition. Sugden, in his treatise on vendors, admits "that it was usual to search for judgments against a vendor only from the time he purchased the estate," Sugden on Vendors, 340. But he condemns the practice, and refers to cases which Yeats, J. in *Calhoun v. Snider*, 6 Bin. 138, says, "will not warrant the doctrine to the extent laid down by that author."

In the case cited, 4 Ohio, 94, the court say, "no adjudged case can be found in the English books, so far as opportunity has been allowed for examination upon the question, whether lands acquired subsequent to the judgment, and conveyed before the execution issues, are liable to inquisition under the *elegit*;" and adds, that the supreme court of Pennsylvania have traced the authority to the year-books, and concludes it is not settled by any of them.

We ought not, then, to gratify the rapacity of judgment creditors, by establishing a lien which has been of doubtful existence in a country in which the most favored debtors in failing circumstances were but prisoners at large. I believe this question has been several times before the supreme court of the territory, and this lien was by that court unhesitatingly repudiated; and such has been the fate of this question in the district courts of the territory in which I have practised, from the first organization of these courts.

The cases of *Calhoun v. Snider*, 6 Binney 138; *Roads v. Symmes*, 1 Ohio, 142, have ever been regarded in those courts as settling this question. Estates have been purchased for years, upon the supposition that the law was clearly settled against such liens, and I presume that the premises in controversy were purchased in confident reliance upon the decisions of the courts. The statute of 1840 does not retroact upon judgments existing at the time, nor give the judgment creditor any rights which he did not possess at the time of its rendition. Whatever rights the statute would confer upon the

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judgment creditor, would impair the rights of the defendant, which are vested, and upon which he had reposed for years in confident security. Therefore the statute should operate upon, and must be construed thus, to act only on judgments *in futuro*. But it is also contended by the majority of the court, that the statutes created a lien in the judgment creditor, upon all lands owned by the defendant at the date of the passage of the act; and consequently that such a lien was created in this case.

Much is said about the intention of the legislature in the act of 1840. I understand the legislature to have intended to confine the limits within which judgments should bind lands; whereas the limits of the lien without a statute were controverted: also to limit the lien to and from the day upon which judgment was rendered; and also to have the unwritten law printed and published, and to adopt a printed rule for future action. To place such a construction upon this act as is contended for by the majority of this court, will be to give the judgment a power which no judgment can possess, rendered since the passage of that act; for the reason, that such a construction will make a judgment bind real estate which was acquired by the defendant in the execution, after the rendition of the same, which no judgment possesses the power of doing, rendered since the act of 1840.

I cannot, therefore, agree with the majority in their construction of this act, nor in their conclusion, that the court below erred in charging the jury that the plaintiff in this case has not shown that in law he has any valid, subsisting interest in the land described in his declaration. This was the duty of the court, if the plaintiff depended upon paper titles to recover, and there should be a clear, legal defect in plaintiff's title, apparent to the court, as was evident in this case.

It was not charging upon facts, but it was charging the law to the jury. Although I agree with the majority, that the court below erred in the construction of the doctrine of liens, but inasmuch as I think the plaintiff had no right to recover,

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for the reasons above expressed, the errors, if any, were harmless. I am therefore in favor of affirming the judgment of the court below.

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No error will be considered by the supreme court, unless conclusively apparent in the record.

A question of costs should be first adjudicated in the district court.

When the fee bill omits to state that the witnesses therein mentioned had testified in the case, or were material, it will still be presumed that they were witnesses in the case, and entitled to fees.

ERROR, to Des Moines District Court.

This was an action of replevin, commenced before a justice of the peace. The case was taken to the district court by appeal, when the jury returned a verdict for the defendant, and assessed his damages at eight dollars. Judgment was accordingly rendered against the plaintiff for the eight dollars damages; and for one hundred and eighty dollars and seventy-one cents, costs of suit. The only question raised in the supreme court, as will be seen by the opinion, is in relation to costs.

M. D. Browning, for the plaintiff in error.

Hall and Mason, for the defendant.

Opinion by GREENE, J. The errors assigned in this case are not designated by the record. It has been repeatedly decided by this court that no errors can be considered but such as are made conclusively apparent.

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Had the question of excessive and illegal fees complained of been adjudicated by the district court, and brought before us by a bill of exceptions, we should then have the proceedings in a tangible form, and could act upon them advisedly.

Unless the incidental question of fees is first acted upon by the district court, the determination of it by this court would be exercising an original jurisdiction, which is beyond our constitutional province.

No doubt injustice is often done to judgment debtors in the courts below, by an onerous taxation of costs; not usually by the determination of the judge, but by the unadvised and discretionary acts of the clerk; but that evil can be in a great measure remedied by the attorneys, in having suitable rules adopted, and the necessary instructions given, for the taxation of costs.

In this case we are called upon to reverse the judgment, because, as is alleged in the assignment of errors, it does not appear from the record that any of the witnesses mentioned in the fee bill were witnesses in the case, or that they were material for defendant. Had the fee bill been made a part of the record, we could by no means infer from it that those named as witnesses, were not in that case; or that they were not material, for the reverse could be the only legitimate presumption.

Judgment affirmed.

NOTSON v. BARRETT.

Where B. contracted to sell land to N., and bound himself to convey the title upon the payment of the purchase-money as the respective installments became due; and in case of a failure to pay any installment when due, reserved the power to ratify or revoke the contract at pleasure. N. entered upon, improved the land, and paid part of the purchase-money; but failing to pay the balance at the time stipulated, B. rescinded the

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contract, and conveyed the land to another. B. filed a bill in equity to recover the consideration-money, and compensation for the improvements, without alleging insolvency in B., or fraud in the transaction: it was held that the bill did not confer equity jurisdiction, as it sought compensation and damages without asking for other relief; and also held as the facts involved showed, N. to have an adequate remedy at law, a bill in equity would not lie, and that the demurrer was properly sustained.

IN EQUITY, by writ of error to the Des Moines District Court, under territorial laws.

Notson filed a bill in chancery against Barrett, showing that he had purchased from Barrett a tract of land; had paid part of the consideration-money down, and executed his four notes for the balance, payable in annual installments; and that he had received from Barrett a title bond, providing that if the purchase-money should be paid according to contract, the title should be made; and that if he should not pay the respective sums at the time stipulated, "Barrett reserved to himself the right to ratify or confirm the sale or not." The complainant also alleges that after the contract, he took possession of the land, and made upon it permanent and valuable improvements. The bill concedes that the balance of the purchase-money had not been paid, and charges Barrett with having rescinded the contract, and of selling the land to another, and prays that Barrett be decreed to refund the consideration money with interest, and pay complainant for the improvements.

To this bill a general demurrer was filed, and sustained by the court below.

J. C. Hall, for the plaintiff in error. In this case the complainant claims a decree for a sum of money paid upon a contract with defendant for the conveyance of real property; also for the value of improvements made upon the land by complainant during the time he was in possession under the contract.

The complainant claims that equity will relieve him from

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the loss of the improvements; and, in order to do complete justice, will give the relief prayed for.

The contract gave Barrett the power to rescind it at his option, upon the failure of complainant to pay. The contract was rescinded under that provision by the defendant.

The questions are, 1. Has the complainant a remedy at law? That he has a remedy at law for the money paid, is admitted, but that he has for the improvements, is denied. *Welsh v. Welsh*, 5 Ham. Ohio, 425; *Gillett v. Maynard*, 5 John. 85; *Towers v. Burrell*, 1 Term R. 133; *Frear v. Hardenburgh*, 5 John. 272.

That he has a right to recover in equity, see 2 Story's Com. 109; 1 John. Cas. 182, 274; *Todd v. Gee*, 17 Vesey, 279; *Woodcock v. Bennett*, 1 Cowen, 713.

The complainant here claims that this case stands upon as favorable ground for the interposition of a court of equity, as if the money had been paid and labor expended upon a contract void by the statute of frauds: that the act of the defendant, in voluntarily rescinding and putting an end to the contract, was a waiver of all delinquencies chargeable against the complainant, and left him as securely upon his rights as he would have been had he complied, and not been in default: that Barrett obtained his improvements by his own contract and consent, and was not driven to the necessity of so doing. The equity of the complainant, then, is clear. He does not come here in violation of his contract, only as Barrett has consented; the complainant having foregone his rights under the contract. Barrett cannot set up this contract now to defeat his equity to a just compensation for the benefit which Barrett received by the rescinding of the contract.

C. Walker, for the defendant. The demurrer was properly sustained:

1. Because the complainant had no right to come into chancery, to ask a decree for money paid and improvements made, without some special circumstances, as fraud, &c., which is not alleged, as it is not the province of a court of chancery to

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assess damages only as incidental to other heads of relief. *Kernshal v. Stone*, 5 John. Ch. R. 193; 2 Story's Equity, 104, 109.

If a purchaser has no ground of complaint for specific execution, for reversion of contract on ground of fraud, mistake, or the like, he has no right to the value of improvements. See authorities above.

2. Because time was of the essence of the contract, and Barrett was legally and equitably authorized to re-sell the land, as complainant failed to comply with the contract. *Hatch v. Cobb*, 4 John. Ch. Rep. 559; *Gillett v. Maynard*, 5 John. 89; *Gary and Gary v. Hull*, 11 John. 440.

3. Complainant's equity is his default in not paying the money; for he alleges no fraud or any obstacle thrown in his way by Barrett, and a court of equity never aids one who is in default by his own wrong. He has not done equity, and the court will leave him to his fate in a court of law.

4. He may have remedy at law for money paid, which is admitted by complainant, but he cannot have remedy for improvements, in chancery; because he sets out a violation of contract on his part, rendering it proper to rescind contracts by Barrett according to contract, and in which he shows his negligence as his equity. Just like a case where complainant shows that a contract was made between him and defendant, by which a bond was given by defendant to him, upon his misrepresenting the quality of a horse for which the note was given, and praying a discovery and relief. Here he had no remedy at law, but he should have no assistance from a court in chancery.

Opinion by HASTINGS, C. J. The complainant filed a bill in chancery for compensation and damages for improvements made on a tract of land and purchase-money paid, which the defendant, Barrett, had contracted to sell to complainant, and bound himself to deed, upon payment of the purchase-money by installments at specified times; reserving to himself the power to ratify the contract or not, upon failure to pay at the

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time agreed. It seems the complainant failed to pay an installment when due; whereupon the defendant, Barrett, conveyed the premises to his co-defendant. This bill seeks a recovery of the money paid, and compensation for improvements.

The bill does not charge fraud against the defendant; on the contrary, it appears from the contract appended to the bill, and the facts stated, that he has exercised a right reserved. The question is directly raised here by defendant's demurrer, whether a bill in equity can be sustained for such compensation and damages, seeking no other relief? "In the present state of the authorities, involving, as they certainly do, some conflict of opinion, it is not possible to affirm more than that the jurisdiction for compensation or damages does not ordinarily attach in equity, except as auxiliary to a specific performance, or to some other relief. If it does attach in any other case, it must be under very special circumstances and upon peculiar equities." 2 Story's Eq. § 799.

There are no special circumstances set forth in this bill which will confer jurisdiction; nothing to show but that the party has a perfect remedy at law. It is true, Barrett has conveyed the land; but if he had not so conveyed, a court of equity would not compel him to convey to complainant, if he had asserted his right reserved of canceling the contract, on failure to pay the installments when due, time being material. Barrett did not, however, reserve the right to declare a forfeiture of the money paid; and it is his duty to refund the same, and restore the complainant to his original rights; as it is well settled, that if a contract be canceled in part, it must be canceled *in toto*.

The rights of the complainant can be asserted in a court of law. The money paid may be recovered; and whatever may be due from the defendant on account of the cancelation of the agreement, may as well be recovered in law as equity.

If the bill had charged the defendant with insolvency, or in any other manner made out a case showing that he had no re-

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medy at law, and that Barrett's vendee had purchased with notice, it possibly might have been sustained; but, as it is, we think the court below did not err in sustaining the demurrer.

Decree affirmed.

SMITH v. SMITH *et al.*

S. set forth in his bill that S. B. & Co. obtained judgment against him, in February, 1840, for the sum of two hundred and thirty-four dollars, upon which execution was issued, and levied upon eighty acres of his land, which was, in May, 1842, sold to G., as attorney for S. B. & Co. In May, 1844, and some time after the period for redeeming the land had passed, G. conveyed it to C., one of the firm of S. B. & Co. The bill charged that the sale was not duly advertised, and that since the sale, S. had redeemed the land by paying the amount of the judgment to S. B. & Co. The answer of S. B. & Co., duly sworn to, admits the sale of the land as alleged, but denies that it was not legally advertised and properly conducted, and utterly denies that S. had redeemed the land from the sale, or paid one dime towards it; but explains that S. S., the brother of S., had paid to them \$218, 28, which was placed to the credit of said S. S. on their books, with the understanding that when he paid the balance of the judgment against S., with the additional sum of about \$400, which they claimed to have against him, that they would convey the land to S. S., in trust, for the wife and children of S.; that the sum of \$218, 28 was never applied towards redeeming the land, but in 1843 was paid over to the administrator of S. S.; that S. was in no way recognized in the transaction, and that the only pay they had received on the judgment was from the sale and purchase of the land through G., their attorney. The deposition of G. supports the answer in many particulars; but the depositions of B. and S. prove an admission from C. that the judgment had been paid off, and that the land would be deeded to S. only upon conditions similar to those set forth in the answer of S. B. & Co. Held, that the admission of C. was too ambiguous to justify the belief that S. had satisfied the judgment, otherwise than by the land which was sold under execution, and that such testimony was not sufficient to overcome the more definite proof by G. and the explicit answer of S. B. & Co. under oath, strengthened by the lapse of time, no proof of effort, and no receipt of payment by S. Held

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also, that the understanding with S. S. had been rescinded by his administrator, in demanding and receiving back the funds he had deposited with S. B. & Co.

Where testimony is ambiguous, and there is doubt as to its correct application to the facts in question, the promotion of truth, and justice to the witnesses, require that construction which will render it as consistent as possible with the opposing evidence.

IN EQUITY. Appeal from the Des Moines District Court.

M. D. Browning and *D. Rorer*, for the appellant.

Grimes and *Starr*, for the respondents.

Opinion by GREENE, J. Jeremiah Smith filed a bill in chancery against Smith, Brothers, & Co. in May, 1845. It sets forth that on the 17th day of February, 1840, the defendants obtained a judgment against complainant for the sum of two hundred and thirty-four dollars, in the district court of Des Moines county; upon which a pluries execution was issued on the 9th day of March, 1841, and a levy made upon eighty acres of his land; which, on the 15th of May following, was sold to James W. Grimes, Esq., as attorney for the defendants, in satisfaction of the execution: that subsequent to the redemption term, Grimes obtained a sheriff's deed for the land, and conveyed the same, on the 31st of May, 1844, to John Cavender, one of the defendants; that the sheriff's sale was not duly advertised; and that since the sale he has redeemed the land by paying off the whole amount of the judgment to Smith, Brothers, & Co. The defendants in their answer, which is duly sworn to, admit the judgment, execution, and sale of land as alleged in the bill; but deny that the sale was not duly and legally advertised, and aver a full compliance with all the forms and requirements of law, utterly denying that the complainant had redeemed the land from the sale, or paid one dime towards the redemption. Explaining, however, that Samuel Smith, the brother of the complainant, paid to them the sum of two hundred eighteen dollars and twenty-

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eight cents, which was passed to said Samuel's credit on their books; with the understanding, that when he paid the balance of the judgment, and an additional sum of about four hundred dollars, which they claimed to have against said Jeremiah, they would convey the land to Samuel, in trust, for the wife and children of the complainant; and that, in 1843, the said sum of \$218 28, having never been applied to the redemption of the land, was paid over to the administrator of said Samuel Smith. The answer also alleges that Jeremiah Smith was in no way known or recognized in the transaction; and that the only pay they ever received on the judgment against him was from the sale and purchase of the land through their agent, Grimes.

In support of the evidence given in the answer, the deposition of James W. Grimes shows, that he had uniformly acted as agent for the defendants, and had charge of the land in question; that he had paid taxes upon it for them, and redeemed it from a former tax-sale; and that no attempt had been made with him, or within his knowledge, by the complainant, or any one for him, to redeem the land.

The depositions of Browning and Leffler are adduced in support of the averment in the bill; that complainant had redeemed the land and satisfied the judgment. They prove an admission from Cavender, one of the defendants, that the judgment against Jeremiah Smith in their favor had been paid off and satisfied; but that they would make no deed except upon certain conditions. These conditions, as set forth in said depositions, are substantially similar to those specified in the defendant's answer. Upon the bill, answer, and these depositions, setting forth in detail the facts which we have briefly recited, the decree of the district court was rendered for the defendants.

Our only difficulty in arriving at a satisfactory conclusion, on reviewing this case, is in giving a correct application to Cavender's admission of payment. From a careful examination of all the facts and concurring circumstances established by the evidence, we are unable to arrive at that conclusion

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which is so ingeniously urged upon us by complainant's counsel. The general and vague acknowledgment of Cavender, that the judgment had been satisfied, might very consistently apply to the satisfaction arising from the sale of the land, and subsequent transfer to him. It is true that this view, taken abstractly from other facts established by the history of this transaction, might not appear in unison with the proposal to deed the land upon the payment of said four hundred dollars, which they held against Jeremiah Smith, unless made with the express or implied understanding, that the funds of S. Smith in their hands should be retained and applied upon the amount of the old judgment.

The testimony, showing Cavender's confession of payment, is too ambiguous to justify the belief that Jeremiah Smith paid Smith, Brothers, & Co., the amount of their judgment against him, which had been satisfied by the purchase of his land; especially when taken in connection with the deposition of Grimes, and the responsive answer of defendants under oath, denying, in the most positive and explicit terms, that the land had ever been redeemed, or any portion paid towards the judgment, otherwise than by the purchase of the property. Where testimony is ambiguous, as in this case, and there is a doubt as to its correct application to the facts in question, the promotion of truth, and justice to the witnesses require that construction which will render it as consistent as possible with the opposing evidence.

Influenced by this rule, the concurrence of proof establishes the probability that complainant never entered into an arrangement with the defendants to pay for or redeem the land in dispute; and the imperfect understanding with Samuel Smith was never matured, but was utterly rescinded by the administrator of his estate, in demanding and receiving back the funds in the hands of defendants. However much importance may be attached to this arrangement, we cannot see how it can inure to the individual benefit of the complainant.

Again, the lapse of time, running for years after the redemption limitation, without any apparent effort to redeem, or

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proposal to pay ; the production of no receipt, or other voucher of payment, so usual in all business, and particularly essential in land transactions, give strength to our conclusion, that the land never has been redeemed.

The decree of the district court is therefore affirmed.

Dissenting opinion by KINNEY, J. I cannot come to the same conclusion in this case, as have a majority of the court.

The bill alleges that the complainant redeemed the land by paying off to said Smith, Brothers, & Co., the whole amount of said judgment, with interest and costs, and that said amount so paid was received by them as the amount due on said judgment.

The answer utterly denies that said land was redeemed or anything paid by said complainant towards redeeming the same. This allegation in the bill, and peremptory denial in the answer, make the issue to be tried by the court.

As the answer is sworn to, the bill should be dismissed for the want of equity, unless sustained by the testimony of two witnesses, or one witness and corroborating circumstances, in which case (in the absence of testimony fortifying the answer,) the bill must be taken as true.

In support of the bill, Browning swears that in the summer of 1844, he called at the store of the defendants in St. Louis, and informed John Cavender, one of the defendants, that he was requested by the complainant to call and see him about a reconveyance of the land. Witness was under the impression that there was a small balance due upon the judgment on which the land was sold, and so informed Cavender, and asked him what the balance was, as he had money in his hands belonging to the complainant, and would pay it. Cavender then told the witness that the judgment had all been paid off and satisfied, but that he would not convey the land, until the amount of a certain note, which complainant had transferred to the firm of Smith, Brothers, & Co., was paid.

Leffler swears that he was present at the time referred to by Browning, and that Cavender told Browning that the judg-

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ment against Smith had been paid, and that Cavender said (in reply to a question by Browning, if said Smith was entitled to a deed), that the judgment was paid off; but that they did not intend to relinquish their claim against Smith, until they had paid a claim which Smith had transferred to them upon a man in Illinois, which had been dishonored. Here we have the admissions of Cavender, one of the firm, and the one to whom the deed had been made by Grimes, that the judgment upon which the land was sold had been paid and satisfied. The allegation in the bill that the judgment had been paid and satisfied, being thus sustained by two witnesses, I think it sufficiently corroborated to hold the defendants to proof of the responsive matter contained in the answer.

But the answer sets up new matter extraneous and irresponsible to the charge in the bill, which I think has had great influence upon the court, in the decision which has been made. The answer states that one Samuel Smith paid to the defendants \$218, 28, which was passed to his credit, and that there was an understanding and agreement that when he paid over to them the residue that might be upon said judgment, with costs and interest, and the additional sum of \$400, which was due defendants upon a dishonored note, that they would convey the land to Samuel Smith, in trust for the wife and children of the complainant. In another part of the answer, the defendants state that this money had been credited by them to said Samuel Smith; that it was the individual money of said Samuel, and that Jeremiah was not known in the transaction. That the money has been paid over to the administrator of said Samuel, since deceased, and that no portion of it ever was applied towards paying off said judgment.

This portion of the answer, I think not only irresponsible to the bill, but proves conclusively that the money of Samuel Smith was not appropriated towards paying the judgment, nor received for that purpose, and consequently Cavender could not be understood as having referred to this money in his conversation with Browning and Leffler, with which the judgment had been paid off and satisfied. This conclusion is also dedu-

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cible from the fact, that the amount collected for Samuel Smith was not sufficient to pay the judgment, and Cavender having told Browning that the judgment was satisfied, no reference could have been had to the money in defendant's hands belonging to said Samuel Smith. From the deposition of Browning, taken by the defendants, it appears that in the same conversation, Cavender told witness to inform the administrator of Samuel Smith of the amount of money in their hands belonging to the estate, subject to his order, and in pursuance of this information the money was subsequently drawn by the administrator: all of which makes it perfectly certain that the judgment was not paid with this money, and excludes all presumption that Cavender had any reference to its having been paid in that manner.

It appears to me clear then : 1. That the judgment had been satisfied by Smith, although after the time of redemption had expired. That the defendants are stopped from saying that it was not paid in time, and are bound to convey the land.

2. That if the complainant had satisfied and paid off the judgment, the defendants could not as a condition precedent to the conveyance, require the payment of another claim, unless he can prove that to have been the condition upon which the conveyance was to have been made. If these positions are well taken, we are only left to the inquiry ; was the judgment paid ? Upon this point I do not desire any better testimony than the admission of Cavender himself, who states explicitly that the judgment was satisfied. This testimony is neither contradicted nor explained away. Supported by two witnesses, it neutralizes that portion of the answer denying payment, and the bill in that particular must be taken as true. But my brother judges think that Cavender must have meant the payment of the judgment, by a sale of the land. This cannot possibly be a reasonable presumption, as Cavender only attached one condition to the conveyance, which was the payment of the dishonored claim. The judgment was some \$250, and this I cannot think the defendants intended to

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give to complainant, and particularly as there is not any evidence showing Smith's inability to pay the \$400. And yet we are forced to this conclusion, and that the defendants would gratuitously surrender up the judgment, by presuming that Cavender meant that the judgment was paid by the sale of the land.

The plain import of the language, "that the judgment was paid off and satisfied," appears to me to convey the idea, not by a sale of the land to the defendants but by actual payment in the ordinary acceptation and meaning of the word. The facts of the case, and the language of Cavender, fasten the conviction upon my mind that the judgment had been paid independent of and subsequent to the sale of the land. A different conclusion appears to be entirely unauthorized by the testimony.

But it is said that the complainant does not specify in his bill how he paid this judgment. I was not aware that there was but one mode of payment known to the law, and if the complainant states, as he has in his bill, that he paid off the judgment, it will be presumed that he paid it in the currency of the country. Even a want of particularity in the bill ought not to bar the door of equity, if the complainant is otherwise entitled to it. In this case, it appears to me that the complainant has not only shown himself worthy of relief, but that injustice may be done by withholding the relief sought.

MARTIN v. VAN BERGEN.

A judgment of non-suit, because the declaration was not filed in time, may be set aside, when it appears by affidavit that the delay in filing the declaration was occasioned by an arrangement between the parties to settle. The district courts have discretionary power to set aside judgments, upon sufficient cause shown by affidavits.

Martin v. Van Bergen.

ERROR, to Des Moines District Court.

This was an action of replevin, commenced by Isaac N. Leffler, agent for Peter Van Bergen, against Abner Martin. As the declaration had not been filed within the time required by law, the plaintiff was nonsuited; and a jury of inquest was awarded, who found for the defendant, and assessed the damages at one hundred dollars. The cause then came up, on motion of Van Bergen, to set aside the verdict and judgment; which motion was supported by affidavits, showing that the matter in controversy had been settled by mutual arrangement between the parties. Upon the motion and affidavits, the judgment was vacated, and the assessment of damages set aside.

Hall and Mason, for the plaintiff in error.

M. D. Browning, for the defendant.

Opinion by HASTINGS, C. J. In this case there was judgment against defendant entered in favor of plaintiff in error. A jury was empaneled to assess the damages, and judgment rendered on the verdict; after which, at the same term of the court, there were affidavits submitted, showing that the case had been settled, and that the want of a declaration, which was the cause of the default, had been occasioned by an agreement between the parties.

The affidavits show a sufficient excuse in the plaintiff below, in not filing a declaration. The judgment entered was not a final judgment, because it had not been duly entered on record and signed by the judge. The fact of the clerk's entry of a judgment on the verdict does not make it final. The court could alter or amend its judgment at the term at which it was rendered. The statute authorizes the court to set aside a default before final judgment upon affidavits. We think the affidavits were sufficient, and that the court below had a discretionary power over the judgment to set the same aside on

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affidavits; otherwise, every judgment entered by the clerk on a verdict, without the order of the court, would become final, and enable a clerk to prevent the court from exercising a sound and salutary discretion in correcting its own records.

The order of the court below is affirmed.

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Under the statute, the names of the witnesses, upon whose evidence an indictment is found, should be noted upon it. But where the witness was not objected to at the trial on that account, the irregularity will be regarded as waived, and will afford no ground for a new trial.

Had the witness been objected to, and the objection overruled by the court, the proceeding should have been made matter of record by a bill of exceptions, in order to make it cause of error.

When the accused is found guilty on the uncorroborated testimony of an accomplice, it affords good cause for a new trial.

An accomplice should not be admitted as a witness without a previous order from the court, made on an application, showing that there is no other person by whom the offense can be proved; that the witness is not more guilty than the person on trial; and that his testimony can be substantially corroborated.

Though a *particeps criminis* is not an incompetent witness, the court should instruct the jury not to convict of felony on his uncorroborated testimony. Such corroboration should be in facts tending to establish the guilt of the accused.

A verdict for larceny should fix the value of the property stolen.

Where the errors below pertain chiefly to a motion for a new trial, the judgment will not be arrested, but a *venire de novo* awarded.

ERROR, to Henry District Court.

H. W. Starr and J. C. Hall, for the plaintiff in error.

D. Rorer and A. Lotspeich, for the state.

Ray v. The State.

Opinion by KINNEY, J. Ray and Burge were jointly indicted for larceny, at the March term, 1848, in Henry county. Ray pleaded "not guilty," and demurred to the indictment, which was overruled. He obtained a separate trial; and at the same term of the court was tried and convicted, and sentenced to imprisonment, in the penitentiary, for three years. The defendant then sued out a writ of error to this court, procured a *supersedeas* to stay the judgment of this court below, and the case appears before us upon three bills of exceptions taken on the trial, embodying all the evidence, with the instructions of the court, which form the basis of the following assignment of errors:

1. The court below erred in overruling the demurrer of the defendant below to the said counts in the indictment.
2. The court below erred in admitting the evidence of Eurdington to go to the jury, after he had proved himself to have been the principal felon.
3. The court erred in deciding that the witness, Eliza Tagg, should not answer the question, whether there was not a marriage contract between her and witness, Eurdington, as set forth in said exceptions.
4. The court erred in instructing the jury that it was their privilege to convict the defendant on the uncorroborated evidence of witness, Eurdington; and that the instructions contained in the bill of exceptions were not in accordance with law.
5. The court erred in leaving a discretion to the jury, in receiving or rejecting the uncorroborated evidence of Eurdington.
6. The court erred in overruling the defendant's motion in arrest of judgment, and for a new trial.

As a majority of the court are of opinion that the indictment was substantially correct, under our statutes, and consequently the demurrer properly overruled, we will confine our examination to the other errors assigned, constituting, as they do, the most important features of the case, and upon which the court have no difficulty in coming to a unanimous conclusion.

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We will, however, as preliminary to the consideration of the main questions presented by the assignment of errors, notice the point made by counsel, that the court should have granted a new trial, because the name of Eurdington was not endorsed on the indictment.

The statute makes it the duty of the grand jury, in all cases where a true bill is returned into court, to note thereon the name or names of the witnesses upon whose evidence the same was found. *Rev. Stat.* p. 297, § 3.

We think a compliance with this provision of the statute ought in all instances to be regarded.

To protect the innocent, and punish the guilty, are the two great objects to be kept in view in the administration of criminal jurisprudence. While, upon the one hand, the law will hold the offender to a strict accountability, it should, upon the other, extend to the accused all possible facilities for a fair, full, and impartial trial. And as the accused is always presumed innocent until convicted, no course should be adopted that would deprive him of that fair trial so humanely secured to him by law.

The names of the witnesses upon the indictment will inform him of the authors of the prosecution, and thus enable him to prepare for his defense. For his benefit, the crime charged in the indictment is required to be clearly and distinctly stated; that he may know with certainty the nature and character of the offense; and that he may not be taken by surprise on the trial, it is quite as necessary that he should know who the witnesses are by whom it is expected the indictment is to be sustained. Hence the necessity of an observance by the grand jury of this plain and salutary provision of the statute.

In this case, however, it does not appear that any objections were made to Eurdington testifying, in consequence of his name not having been endorsed on the back of the indictment. If the defendant had objected, and the objection been overruled, it should have been entered in the bill of exceptions, and might have then been good cause of error. But after his testimony

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had gone to the jury without objection, it is not on that account sufficient cause to authorize the court in granting a new trial. *McKinny v. The People*, 2 Gil. 552.

But the assignment of errors, to which the attention of the court has been particularly directed by the argument of counsel is, that the court erred in leaving it discretionary with the jury to convict upon the uncorroborated testimony of Eurdington, he being the principal felon. As it is highly important to settle the practice correctly in relation to the testimony of accomplices, we will examine the subject at some length, without being strictly confined to the instructions given.

From the testimony of Eurdington, as set out in the bill of exceptions, it appears that he testified that he stole the coin, pieces of gold, bank notes, &c., named in the indictment against Ray; and that the defendant was his accomplice. That he, the defendant, and one Burge had agreed together to steal money. Ray was to find out where the money was that could be taken, and that he and Burge were to steal it. Defendant had informed him about the place, amount, and other circumstances in relation to the money stolen; and on the evening the money was stolen they had met, and the defendant had left to go to Jink's grocery near by, so that he could prove that he was not present.

To corroborate this testimony, Mrs. Eliza Tagg was sworn, who testified that Burge said, in a conversation with Ray, a day or two after the money was stolen, that Gilchrist would not get his money again; and that Ray said he would have his share of it.

This is the only testimony materially corroborative of that given by Eurdington. She also states that she was living separate and apart from her husband; that Eurdington was in the habit of visiting her, and that they were upon intimate terms, evidently disclosing the fact that she was the adulterous paramour of Eurdington. She had also been arrested as an accomplice in the crime, and not only appears before the court under most unfavorable and suspicious circumstances, in a character which would have authorized the court in regarding her testi-

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mony with great disfavor, but she was, also, as appears to us from the record, successfully impeached.

Eurding's testimony, which was of the lowest grade, emanating from a source, of which it has been said, the law confesses its weakness by resorting to testimony so foul and corrupt,—coming from a witness whose own confessions stamp him with disgrace and infamy, standing as he does in the halls of justice the accused and acknowledged perpetrator of the crime—is attempted to be counteracted by a witness but one step less in degradation than the felon himself.

Remaining, as the testimony of Eurding did, uncorroborated, it becomes important to inquire, whether a conviction upon such testimony, with slight, and, as we think, immaterial corroborating circumstances, ought not to have entitled the defendant to a new trial.

The rule appears to have prevailed in England, that an accomplice could not be permitted to testify without first obtaining an order from the court. *Crim. Cir. Court Cases*, p. 51. The reason of this rule is, that courts will not permit a resort to testimony so foul, unless the exigencies of the case imperiously require it; and even then they will exercise discretion with great caution, unless the witness can be corroborated with other testimony. Besides, an implied pardon is held out to the witness, which ought not to be done, unless justice can be promoted by a punishment of the greater offender by extending a pardon to the one less tainted with guilt. *The People v. Whipple*, 9 Cow. 709. We think the safer practice is, not to permit an accomplice to be brought into court as a witness without an order from the court for that purpose, and that the application ought to show: 1. That there is no other witness by whom the offense can be proved; 2. That the witness is not more guilty than the person on trial; and 3. That the testimony can be substantially corroborated.

Upon such application, if the court think that public justice can be promoted, crime suppressed, and the guilty punished, by extending a merciful hand to one who confesses his guilt, we think they may legally exercise their discretion by permit-

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ting the accomplice to be produced as a witness. In the case above cited, of *The People v. Whipple*, this question underwent an able examination.

An effort was made to introduce Strang, who had been convicted as an accomplice, as a witness against the prisoner. The motion was denied by the court, principally upon the ground that an implied promise of pardon or of judicial recommendation to executive favor would be the result of permitting him to testify. And as Strang appeared to have been an actor in the guilty drama for which the prisoner had been indicted, the court would not permit him to testify. And the learned judge says: "We are satisfied, both upon principle and authority, that Strang, standing before us convicted as an accomplice with the prisoner, can only be admitted to testify against her at the discretion of the court; and from the facts and circumstances of the case, we are as clear that it would be an improper exercise of that discretion to admit him."

We think it clear that the accomplice, either before or after conviction, ought not to be permitted to testify without permission from the court. And when so admitted, it does not follow, as a consequence, that his testimony, of itself, is sufficient to convict.

It is a well-settled rule of evidence, that a *particeps criminis*, notwithstanding the turpitude of his conduct, is not on that account an incompetent witness; but the judges in their discretion will advise a jury not to convict of felony upon the testimony of an accomplice alone and without corroboration. 1 Greenl. Ev. 426.

Judges, observes Lord Ellenborough, in their discretion will advise a jury not to believe an accomplice, unless he is confirmed, or only so far as he is confirmed; but if he is believed, his testimony is unquestionably sufficient to establish the fact he deposes to. Roscoe's Crim. Ev. 143. Although, in England, a conviction upon the uncorroborated testimony of an accomplice may be legal, yet the courts, in the exercise of sound discretion, as appears from all the authorities, will direct

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the jury not to convict upon such testimony. As has been said, they can be used as witnesses in particular cases, but that in a regular system of administrative justice, they are liable to great objections. "The law," says one of the most useful writers on criminal jurisprudence, "confesses its weakness, by calling in the aid of those by whom it has been broken. It offers a premium to treachery, and destroys the last virtue that clings to the degraded transgressor." Russell on Crime, p. 67.

In the case of the *United States v. Jones*, 2 Wheeler's Cr. Cas. 451, the court decide that although competency may be restored by pardon, after the witness had served out his time in the state's prison, yet no credit is due to him unless he is corroborated by others, or the circumstances of the case.

In England, the courts, in some instances, have regarded the testimony of accomplices with some apparent favor. But in a country like ours, where justice is administered without fear or favor; where the high and the low, the rich and the poor, stand upon the same equality in courts of justice; where life and human liberty are guarded and protected by the government and laws with great tenacity; we know of no good reason why they should be jeopardized and destroyed upon the uncorroborated testimony of an acknowledged felon. Public feeling or judicial necessity does not require so wanton a sacrifice of these rights, so wisely secured to every citizen in the administration of justice. And yet such would be the fearful consequences, if conviction could be procured upon the uncorroborated testimony of an accomplice. Such testimony, standing isolated and alone, contaminated by its own corruption, the court ought to instruct the jury, is not sufficient to convict. 1 Greenl. Ev. 427; Roscoe's Crim. Ev. 143; *Commonwealth v. Bosworth*, 22 Pick. 399.

But the testimony of the accomplice must not only be corroborated, but the corroboration ought to be as to some fact which goes to prove the offense charged against the prisoner. 2 Russell on Crime, 922; 2 Hawkins' Pleas of the Crown, 603; 1 Greenl. Ev. 427.

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In Farly's case, in charging the jury, Lord Abringer said, "I am strongly inclined to think that you will not consider the corroboration in this case sufficient. No one can hear the case without entertaining a suspicion of the prisoner's guilt; but the rules of law must be applied to all men alike. It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the testimony is corroborated in some material circumstance." 2 Russell on Crime, p. 963.

In the case of *The Commonwealth v. Bosworth*, 22 Pick. 399, the court awarded a new trial upon the ground, that although the witness was corroborated in some even material facts, yet the corroboration was not sufficient. Judge Morton lays down the rule to be, that the corroborative evidence must relate to some portion of the testimony which is material to the issue.

To prove that the accomplice had told the truth in relation to irrelevant and immaterial matters which are known to everybody, would have no tendency to confirm his testimony, asserting the guilt of the party on trial. The learned judge also states that the courts consider it their duty to advise a jury to acquit, when there is no evidence other than the uncorroborated testimony of an accomplice.

From these authorities, as well as from a careful examination of all to which we have had access upon this subject, we think we are safe in laying down the following rules:

1. That the court ought not to permit an accomplice to be sworn, without a previous application for that purpose.

2. That, as an accomplice, he stands before the court and jury in the character of an impeached witness, and as such his testimony requires confirmation.

3. That the confirmation must be in relation to some material fact about which he has testified, involving the prisoner's guilt.

4. That unless the accomplice is so corroborated, it is the

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duty of the court to advise the jury that his testimony is not entitled to credit or belief.

In this case the court instructed the jury, that whether the testimony of Eurdine was sufficient, or insufficient, to establish the guilt of the defendant, was for the consideration of the jury; but that in the opinion of the court, the jury ought not to convict the defendant upon the uncorroborated testimony of Eurdine. We think, if the testimony was not corroborated, the court should have told the jury that they should disregard it entirely; but especially should the court have granted a new trial, on a conviction on such testimony.

Another error assigned is, that the jury ought to have found the value of the property stolen.

The criminal statute of Iowa has drawn a marked distinction between larceny and petit larceny. When a person steals twenty-five dollars, or upwards, it is a larceny for which he can be punished by imprisonment in the penitentiary; a less amount will only subject him to imprisonment in the county jail, &c. The first is denominated larceny, and the latter petit larceny. As the verdict in this case was a general one of guilty, without fixing the value of the property, it does not necessarily follow that the defendant is guilty of having stolen twenty-five dollars, or upwards; nor does it necessarily follow that the jury so intended it. It is well settled, that under an indictment for larceny, the jury may find the defendant guilty of stealing a part, or the whole, of the money or property laid in the indictment. On the indictment against Ray, the jury could have convicted him for having stolen an amount which would only have subjected him to imprisonment in the common jail, and there is nothing in the verdict to show but that such was the case.

The verdict should have fixed the value of the property stolen, that the court might have known with certainty, under which offense the defendant had been convicted, as without such finding under the statute providing the punishment for larceny, the court could not well pass the sentence. *Highland v. The People*, 1 Scam. 392. As this case comes before us upon the

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ruling of the court upon the motion to arrest, and for a new trial, we will not arrest the judgment, but avail ourselves of the discretion with which we have been clothed by the statute.

The statute provides "that the supreme court shall have power to direct a new trial, discharge the defendant, pass sentence, or remit the proceedings to the district court, with directions to proceed and render judgment." *Rev. Stat.* p. 156, § 75.

From a full and careful examination of this case, deeply impressed with its importance to the defendant, who is under a sentence consigning him to disgrace and infamy, convicted, as he has been, upon the testimony of one who acknowledges his own crime and corruption,—recollecting that it is one of the boasted principles by which the character of our criminal jurisprudence is said to be marked, that if there are any doubts, that the criminal shall be entitled to the benefit thereof,—and at the same time, keeping steadily in view the necessity of punishing all violation in the criminal law, we cannot come to any other conclusion, than that principles of law, of humanity, and justice demand for the defendant a new trial.

We think the court erred in overruling defendant's motion for a new trial. A *venire de novo* is awarded, and the plaintiff in error, Henry Ray, ordered to appear on the 1st day of the next term of the district court of Henry county, for trial.

Judgment reversed.

 NOBLE *et al.* v. THE STATE.

Under the revenue statutes of 1844, lands are subject to sale for taxes in two years after the taxes shall have become due, and remain unpaid, dating from the first day of January, on which the taxes became delinquent.

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The intention of the legislature is a prevailing object in the proper construction of a statute; and that intention can be best determined by the application and meaning of the language used. But if the language in portions of an act is not consistent, it should be so construed as to accord with the leading object of the enactment.

When the manifest intention of the legislature may be gathered from prior existing laws, and from the prevailing tone of other sections of the act, conflicting words may be diverted from their literal meaning, in order to harmonize with more explicit portions. They may be restrained, enlarged, or qualified, so as to give effect to the obvious intention of the law.

ERROR, to Henry District Court.

Hall and Mason, for the plaintiffs in error. The rules of construction which govern remedial statutes are not applicable to the construction of creative and disabling statutes, and to statutes for raising revenue. The doctrine *in pari materia*, does not apply. 9 East. 44; *Rogers v. Goodwin*, 2 Mass. 475; 3 *ib.* 215, 523; *Ayres v. Knox*, 7 *ib.* 306, 523; *Pearce v. Atwood*, 13 *ib.* 354; 12 Pick. 223; 10 *ib.* 505; *Ludlow v. Johnston*, 3 Ham. 553; 3 Caine, 259; *People v. Allen*, 6 Wend. 486. Tax laws should be strictly construed, and nothing taken by intendment. *Young v. Martin*, 2 Yeates, 306; 1 Scam. 565, 325, 336, 476; 2 *ib.* 17, 225.

The plaintiffs in error insist that in the construction of the law it should be construed so that the following propositions shall be preserved.

1. That the court should allow two full years as a term between the time of the return of the delinquent list, and the time when the treasurer certifies the final delinquent list for payment.

2. That the rules of construing, disabling, and independent statutes, shall be applied in this case.

3. That the court have no right to change the language of the statute for the purpose of shortening the time of payment of taxes, or in prejudice of the rights of tax-payers.

4. That the court ought not to change the meaning of the statute for the purpose of retaining a construction which will give an enormous interest to the state.

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5. That where the seeming conflict is time, and indulgence towards the person who is affected by the law and the interest in favor of the state, that the rights of the former must prevail.

6. That the court must give the full time, even if in construing the terms used in the statute they give more than the lawgivers intended.

D. Rorer and *A. Lotspeich*, for the state. The following points and authorities were submitted by Mr. Rorer. The judgment of the court below was rendered, under the act of assembly, of the 15th of February, 1844, for the subjecting of lands to sale for non-payment of taxes. Section 51 of said act has reference to section 52, in relation to taxes "due and unpaid," and does not refer to section 53. The presumption is, that there was some intermediate amendments made, while under its passage, which caused the ambiguity and apparent displacing of those sections from their natural order.

To give the act the construction claimed by defendant in error would be to render it nugatory for one whole year, after a delinquency had occurred; and courts never give to a statute such a construction as will defeat its own purpose. 9 Wheat. 381.

The intention of the legislature is to govern in the construction of a statute, although it may violate the letter of it. 3 Cow. 89; 2 Pet. 662; 15 John. 358; 1 Pet. 64.

The court must consider the policy of the statute, and give it such construction as is best calculated to advance its object. 3 Ham. 198; Ohio Cond. Rep. 205. A statute is to be so construed as to give it a reasonable effect, and taking in view here the fact of so high an interest being affixed for the two years of delinquency, clearly contemplated, it cannot be supposed that an additional year of indulgence was intended free of interest. 3 Mass. 523; 5 *ib.* 380; 7 *ib.* 458.

A general meaning will control a particular clause of a statute, and should be so construed when necessary to harmonize a statute. See *Holbrook v. Holbrook*, 1 Peck,

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248; *Mendon v. Worcester*, 10 Pick. 235; 3 U. S. Dig. 485, §§ 77, 78.

The general system of legislation may be considered together, (as to the subject matter,) in construing a statute; and it is proper to consider other statutes, though repealed. 3 U. S. Dig. 485, § 82; 3 Mass. 17, 21, 296; 8 *ib.* 418, 423. This is a remedial statute, and is to be construed so as to advance the remedy. 3 U. S. Dig. p. 486, § 120.

Opinion by GREENE, J. This suit was brought upon the delinquent tax list of Henry county, for 1845.

The report of the treasurer to the district court is in accordance with the revenue act, approved February 15, 1844. See Laws of that year, p. 28.

The only question raised is, whether the report is not made, and the judgment rendered at too early a day? The judgment below was rendered for taxes of 1845, after due publication in March, 1848. It is urged that the judgment should not have been rendered until the first term of the district court after the first day of January, 1849; thus allowing a period of over three years to run after the taxes are returned delinquent, before enforcing collection. The question involved is one entirely of statutory construction, resting principally upon sections 49, 50, 52, 53, and 54 of the revenue act referred to. Section 53 presents an evident incongruity with other portions and the leading intention of the act, which cannot be easily reconciled by a literal construction of the language. Section 50 provides that the treasurer shall, as "soon after the first day of January in each year as possible, make out a complete list of the lands and property upon which the taxes remain unpaid, which list he shall file in his office." And section 53 provides that "the treasurer shall receive the taxes due upon the delinquent list, during the space of two years from the first day of January next after the said list shall have been filed in his office as delinquent." It will be seen, that as the delinquent list is not to be filed till after the first day of January, and as the treasurer is to receive the taxes for two years from the first of

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January next after the list is so filed, the literal purport of section 53 would extend the sale until after three years from the period of delinquency.

By section 5, "all taxes upon any lands and property due and unpaid on the first day of January, for the previous year, and returned delinquent as aforesaid, shall draw interest at the rate of fifty per cent. for the first year they shall so remain unpaid, and one hundred per cent. for the second year;" and section 54 enacts, "that when the taxes upon lands in any county have remained thus due and unpaid for the said term of two years, it shall be the duty of the county treasurer to make report thereof to the district court of this county at the first term thereafter."

The policy of prior statutes on the subject of taxes was lenient, and allowed the delinquent two years after sale to redeem; and is it not the manifest object of the present law to give him two years in which to pay before sale? It urges him to prompt payment by imposing a heavy interest, which, as before, is not appropriated to the pocket of the grasping speculator, but to the public good.

Inferring the intention of the enacting power from the spirit and connection of the act, we are led to the opinion that the period designed by it, before sale, cannot be three, but two years from that first day of January on which the taxes became delinquent. The fact, that but two years' interest is provided for, is repugnant to the idea that the legislature intended to protract the sale, and leave a third year without any visitation upon the defaulting party, when he has become more than ever culpable, and incurred a triple delinquency.

The 54th section contemplates, that when the taxes shall have remained due and unpaid for two years, the treasurer shall make report of the land preparatory for sale. But it is argued that the "said term of two years" refers to the term spoken of in the 53d section. Take the sentence together, with the words "taxes due and unpaid for the said term of two years," and we think it must necessarily refer to the two years as limited in section 52; for if referred to section 53 it

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would be palpably inconsistent; it being urged that according to that section, the taxes must be due and unpaid for three years.

It is contended, that the last words in section 53 should be so transposed as to make the section, in effect, read as follows: The treasurer shall, after said list shall be filed in his office as delinquent, receive the taxes due thereon during the space of two years from the first day of January; in which case the first day of January would naturally refer to the first day of January mentioned in the preceding section, being the day on which the taxes became delinquent. This interpretation possesses much plausibility, as it reconciles this section with the other portions of the act; whilst, if we take the strict terms of this section, we are unable by any admissible construction to reconcile the other sections.

The intention of the legislature is the leading, and indeed the only object to be inquired into by a court in construing legislative enactments; and it must be conceded, that the first and most direct means in arriving at that intention, is in the application and meaning of the language used. But when the language in different parts of an act conflicts or is inconsistent with the leading object of the enactment, can there be a better or safer rule than to place that construction upon it which will reconcile and harmonize with the prevailing intention? Where the object of the law-makers may be collected from prior existing laws, and from the expressed language of many other sections, as in the act before us, we may be justified in giving a construction contrary to the literal application of the words. It frequently becomes the duty of courts, in giving effect to the manifest intention of a statute, to restrain, enlarge, or qualify the ordinary and literal meaning of the words used. *Burgett v. Burgett*, 1 Ham. 469; 4 Bac. Abt., pp. 38, 45, 50.

When, as in this case, the language of a part of one section of an act is in conflict with both the language and leading design as expressed in several other sections, we can see no other safe path than to follow the express words of the leading and prevailing portions.

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Upon the whole, then, we are of the opinion, that by the revenue act of 1844, the lands are to be reported to the court, and ordered for sale, after the taxes due thereon shall have remained due and unpaid for the term of two years; and that the judgment below be affirmed.

Judgment affirmed.

FEAR et al. v. DUNLAP.

Where a person, not a party, writes his name on the back of a negotiable promissory note, the law presumes that he is a strictly commercial indorser, even when his indorsement cannot be made operative without the name of another.

Such an indorsement on an instrument not negotiable creates no liability, without oral or written proof of an undertaking to be responsible for a valid consideration.

Such an indorser on any note incurs whatever liability he assumes, on sufficient consideration, and the holder may fill up the blank indorsement with the undertaking, and recover accordingly; and if he assumes the responsibility of guarantor, he is relieved from liability only to the extent of the injury he may prove for want of demand and notice. But under our statutes it is not necessary for a plaintiff to prove demand and notice, in order to recover in a suit against an indorser.

Where a person not a party to the note refused to assume the liability of a maker or surety, but merely to indorse, he will be considered a second indorser; and a recovery cannot be had against him in the name of the payee, on special counts as the maker, or as guarantor of the note, nor on the common counts. But if the payee had indorsed and put the note in circulation, a subsequent indorsee might recover against such party as second indorser, had the maker failed in payment.

ERROR, to Des Moines District Court.

An action of assumpsit on a promissory note, made by Abner Martin and J. L. Bradley, payable to Fear and Ralston, or order, and indorsed in blank by John S. Dunlap. The

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suit was commenced against Dunlap alone, by a declaration containing six counts; the first charges Dunlap as maker; the second and third as guarantor; and the other three are for money had and received, an account stated, and for goods sold and delivered. The defendant demurred generally to the first three counts, and pleaded the general issue to the others. The demurrer was overruled, and on the trial it appears that the plaintiffs offered the note in evidence, under the first count of the declaration.

On objection by the defendant, the court decided that the note should not be read in evidence to the jury. The plaintiffs then wrote over the blank indorsement of the plaintiff the following guaranty: "In consideration of forbearance extended to the within Abner Martin and James L. Bradley, of the original consideration of this note, from the date for sixty days as therein mentioned, I guaranty the payment of the within note." The note was then given in evidence, and the plaintiffs proved declarations made by the defendant, tending to show that Martin and Bradley who signed the note, were indebted to the plaintiffs at the time the note was given, and that it was executed by them; that Dunlap indorsed it by way of security, and that the indebtedness was extended sixty days in consequence of the security. Demand and notice were not proved. The defendant proved that he refused to sign the note as security, and that he signed it as indorser only.

The court instructed the jury, that before the plaintiffs could recover on the note, they must prove a demand of the money due thereon from Martin and Bradley, and notice of non-payment to Dunlap, within a reasonable time after the maturity of the note. Verdict and judgment for the defendant.

Hall and Mason, for the plaintiffs, insisted that the defendant was liable on the evidence introduced by plaintiffs, as drawer of the note. *Nelson v. Dubois*, 13 John. 175; *White v. Howland*, 9 Mass. 314; *Moies v. Bird*, *ib.* 436; *Hunt v. Adams*, 5 *ib.* 358.

The court erred in instructing the jury that proof of a

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demand of payment from Martin and Bradley, and of notice to Dunlap, was necessary to enable the plaintiffs to recover.

The evidence shows the character in which Dunlap signed the note—shows the consideration, and establishes the liability of defendant. No demand of Bradley and Martin was necessary; and if the defendant suffered for want of notice, the *onus* of proving that fact rests upon him. *Douglass v. Howland*, 24 Wend. 48, 52; *Dean v. Hall*, 17 *ib.* 214; 14 John. 349; *Upham v. Prince*, 12 Mass. 14; 3 Kent's Com. 50, 74; 4 Mass. 258; 8 *ib.* 258; 2 Scam. 325; 3 *ib.* 49, 491, 447; Chitty on Bills, 250; *Lee v. Dick*, 10 Peters, 496; *Miller v. Gaston*, 2 Hill, 188; *Reynolds v. Douglass*, 12 Peters, 497; *Rhett v. Poe*, 2 How. U. S. 458; *Gibbs v. Cannon*, 9 S. and R. 198.

D. Rorer, for the defendant. The bill of exceptions does not show that there was no other evidence than that embodied in it. Therefore, if the *onus* did lie on us to prove solvency of the makers, or prejudice from want of demand and notice, as the law presumes every thing in favor of the charge below, the presumption is, that such proof was made, and has been so decided at this term.

The plaintiffs could not have recovered against us as indorser, for they declared as on a guaranty; nor could they on the common counts, as indorser, for they had filled it up as a guaranty before offering it under the counts subsequent to the first count; and when it was first offered and ruled out, that was under the first count, and while the indorsement remained blank; all which appears by the record.

The plaintiffs allege that as the guaranty, as filled up, shows a stipulation for further delay, or time, that is consideration enough. But in answer to this, the defendant refers to the evidence; and there is nothing in the record to show that there was any evidence to prove that defendant signed under any such stipulation, or with a knowledge of any such object.

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As to our statute law of indorsers of a promissory note, it does not apply. That applies only to notes indorsed by the payee, and not to notes indorsed by a third person.

In the absence of all proof, the law renders defendant subject to be made liable as a second commercial indorser, and not otherwise. The proof let in shows that he did not intend to be liable, except as indorser. He refused to become a security. See 17 John. 326; 1 Spencer, 257; Story on Promissory Notes, 144, 566, 591, 598, §§ 134, 460, 476, 479.

Opinion by HASTINGS, C. J. Without reciting the history of this case, we will proceed to assert principles which, when applied, will dispose of it.

1. That when the name of a third person, not a party to a negotiable promissory note, is written on the back thereof, the law presumes that he is a strictly commercial indorser; and the inference is so strong, that it will prevail even when his obligation as indorser cannot be made operative, without first obtaining the name of another to the paper. *Herrich v. Carman*, 12 John. 159; *Tillman v. Wheeler*, 17 *ib.* 326; *Crozer v. Chambers*, 1 Spencer, 256.

In the case of *Tillman* and *Wheeler*, the court decided that such is the legal presumption from the appearance of the paper without explanatory proof. See, also, *Hall v. Newcomb*, 3 Hill, 234, in which it is decided that such an indorser, not being privy to the consideration, will be considered a strictly commercial indorser.

2. That such an indorsement on a note not negotiable, or any other instrument of writing, (except on negotiable paper,) without proof oral or written, of an undertaking to be responsible in some manner for a good consideration, means nothing, and the indorser incurs no liability.

3. That such an indorser on paper not negotiable, or negotiable, incurs whatever liability he assumes; that of guarantor surety, original maker, or second indorser, if he so agree, and the consideration be sufficient, and that the holder has the

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right to fill up the blank indorsement with the undertaking, and recover accordingly. *Nelson v. Dubois*, 13 John. 175; *Seabury v. Mungerford*, 2 Hill, 80; *ib.* 181.

4. If such an indorser assume the responsibility of guarantor, either on a note negotiable or not negotiable, he is not relieved from liabilities, unless he prove that, for want of demand and notice, he has been injured, and then will only be discharged in an amount equal to such injury. *Rhett v. Poe*, 2 How. 485.

5. Under our statutes it is not necessary for a plaintiff in a suit against an indorser to prove demand and notice, to entitle him to recover.

If the above conclusions be correct, and they are deducible from the latest and ablest decisions, it necessarily follows that Dunlap could not be charged as a maker of the note in controversy, as is alleged in the first count of the declaration, nor in the character of a guarantor, as averred in the second count, without the evidence to make him incur such responsibilities. The cases cited making Dunlap responsible as a maker, because of his blank indorsement, by presumption of law, and authorizing the holder to declare against him as such, have been so explained, or indirectly overruled by later decisions, and are so contrary to what is commonly understood to be the liability of such an indorser, that we do not regard them as of any weight in this case.

In the case of *Crozen v. Chambers*, Chief Justice Hornblower, says: "The mere signature of such third person on the back of a note, *per se*, creates no commercial contract whatsoever, though it may subject him to the liabilities of a second indorser, if the payee thinks proper to indorse it also, and put it in circulation, and the note should get into the hands of an innocent *bona fide* holder." It seems from the evidence that the defendant refused to assume the liabilities of a maker or surety, but agreed to, and did indorse the note.

Unless proof then was offered of a different undertaking, he must be considered a second indorser. From the record then, we are forced to the conclusion that the plaintiffs cannot main-

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tain their action against defendant on the three special counts, nor can the action be maintained on the common counts.

The defendant does not stand in that character on the paper which will permit a recovery in the name of the plaintiffs.

If the plaintiff had indorsed the note and put it into circulation, a subsequent indorsee could recover against the defendant. The undertaking of the defendant was, to pay the note to a subsequent indorsee, in case of the failure of the maker. The plaintiffs would not be liable to defendant on their indorsement, and could indorse the paper without recourse, so as to be liable to no subsequent indorsees.

The instructions of the court below as to demand and notice were erroneous.

Judgment reversed.

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By provision of statute, an account bears interest from the time of its liquidation; and that will be presumed from the day the account was presented for payment, if no objection is made to its correctness.

In order to recover interest on an account, it should be averred in the declaration, and specified in the bill of particulars.

Where the damages awarded in the district court are more than the amount laid in the declaration, a *remittitur* may be entered for the excess, and judgment affirmed in the supreme court for the amount alleged.

ERROR, to Des Moines District Court.

M. D. Browning, for the plaintiff in error, cited 1 Chitty, Pl. 370; *Roberts v. Smith*, Morris, 417.

Henry W. Starr, for the defendant, cited 7 Wend. 315, 318; 2 Blackf. 338; 1 Paine and Duer's Prac. 358, and note.

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Opinion by GREENE, J. The only error assigned in this case, is that judgment was rendered for a greater amount than is claimed in the declaration. It contains two counts in *indebitatus* and *quantum meruit* assumpsit; averring damages at two hundred and four dollars and sixty-five cents. Neither the declaration nor bill of particulars contains any claim for interest. The judgment was rendered for the sum of two hundred and twenty dollars and ninety-two cents; the surplus being for interest. An account will evidently bear interest, under our statute, from the time of its liquidation. *Rev. Stat.* 293, § 1. This will be presumed from the day the bill was presented, if no objections are made to it. But to recover interest on an account, it should be averred in the declaration, and specified in the bill of particulars. *Schermerhorn v. Perman*, 2 Bailey, 173; 2 Stewart, 225; *Roberts v. Smith*, Morris, 417.

The question of interest often becomes a matter of controversy and proof. If the claim for it is not set forth in the declaration or bill of particulars, the defendant would not have sufficient notice of the extent of plaintiff's claim, and on the trial might be taken by surprise, and innocently lose for the want of sufficient time to procure the necessary testimony. For this reason we think it would be unsafe to recognize a different practice from that which was established by decisions in our territorial supreme court.

As the damages found are greater than the amount laid in the declaration, the plaintiff may release the surplus, and take an affirmance of the judgment below for the amount claimed.

By the approval of plaintiff's attorney, a *remittitur* will accordingly be entered for the balance, over the sum of two hundred and four dollars and sixty-five cents; for which amount the judgment of the court below will be affirmed.

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NORRIS v. SLAUGHTER.

The statute of limitations of 1848, containing no saving clause, but unconditionally repealing the prior limitation law, cannot be pleaded in bar to an action of assumpsit until six years after it took effect. It does not operate retrospectively upon contracts.

A statute of limitations constitutes a presumption of payment from lapse of time; it is merely a statute of repose, forming no part or consideration of a contract; and as a party can and should preserve evidences of payment, its repeal can work no grievance.

ERROR, to Lee District Court.

An action of assumpsit on a promissory note, made by Joseph Norris, on the 2d July, 1880, promising to pay Samuel Slaughter the sum of five hundred dollars, in five years after date. The declaration contains several special and common money counts. The defendant pleaded non-assumpsit, no consideration, and the statute of limitations. Issues were joined to the pleas of non-assumpsit and no consideration; and to the plea of the statute of limitations the plaintiff replied, that his cause of action accrued more than six years preceding the 4th July, 1848—to wit, on the 2d July, 1835; and that at the time his cause of action accrued, he was beyond the limits of Iowa, and did not come into the limits of the territory until six years next previous to the 4th July, 1848, and not until October 21, 1839.

To this replication defendant rejoined, that plaintiff, after coming into the state, did not institute his action within six years. The plaintiff demurred to the rejoinder, and the demurrer was sustained. On the issues joined the jury returned a verdict for the plaintiff, and the court rendered judgment accordingly. It is now urged by the plaintiff in error that the demurrer should have been overruled.

C. Walker, for the plaintiff in error. The demurrer filed brought to judicial view the whole record of the pleadings, and imposed on the court the duty of deciding against that

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party who had committed the first fault in pleading, in substance, as it was a general demurrer which did not reach matters of form. Now, as the plea, replication, and rejoinder, present the facts on the record, and the court judicially will take notice of the statutes of limitations applicable to the case, the only question is, did the pleadings authorize judgment for the plaintiff or not?

No exception is taken to declaration: and the first question is, was the plea (considering it and the declaration alone) a bar to the action? To the plea, as a *prima facie* bar, no exception can plausibly be made, because the cause of action accrued on the 2d July, 1835, and suit was not brought till the 13th April, 1846, more than six years after the cause of action had accrued; that period being the limitation prescribed for bringing the action, by the law in force, passed in 1843.

Assuming, then, that the plea was a valid bar to the plaintiff's declaration, and was so considered by plaintiff, who filed a replication setting forth facts in avoidance of the plea, this brings up the next question, which is, was the replication a legal avoidance of the plea?

These facts were, that plaintiff was a non-resident when the cause of action accrued,—did not come into the state till Oct. 1839, and that the period of six years had not elapsed before the 4th July, 1843.

The plaintiff stated these facts, doubtless, to bring his case within the operation of the prior act of limitation, which was repealed by the act of 1843. By the former act the limitation was five years, with the saving of five years in behalf of non-residents after coming into the state; but by the latter acts of 1843 repealing the former, the limitation is, without any saving, six years. The plaintiff therefore claimed, as his action was not barred when the act of 1843 was passed, (having only been in the state four years, and the saving allowing five years,) and as the former law was repealed, he was entitled to six years to prosecute his action after the passage of the acts of 1843.

The question so presented by the replication, as, whether

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the plea was answered by the replication, the plaintiff in error insists should have been decided in his favor, being the first defective step in pleading.

Now, without insisting that statutes of limitations relative to the *lex fori* are remedial, and are to be taken by a foreigner as furnished by the state where the remedy is sought, and that he cannot claim any more favor than a resident; and for the purpose of the present argument, not contending that the legislature can take away all remedy by repealing one law which allows further time to sue, and enacting another by which the remedy is barred, it is insisted that the legislature have the power to shorten the period of limitation in their discretion, provided they allow a reasonable time within which to sue; and that the court will not pronounce a law to be unconstitutional emanating from a co-ordinate branch of the government, unless it be a clear and palpable violation of the constitution; and that the period within which suit is to be brought is clearly unreasonable, amounting to mockery rather than redress. *Blackford v. Peltier*, 1 Blackf. 36; *Sturges v. Crowningshield*, 4 Wheat. 207; *Ruggles v. Keeler*, 3 John. 263.

The plaintiff, as a non-resident, cannot claim more than the benefit of the law in force when the contract was made, and when he came into the state; this would treat the statute of limitations as the law of the contract.

By that law he had five years after he came into the state to sue. If he was entitled to the five years after he came into the state, then the limitation law was unconstitutional and void, so far as it repealed that saving in his favor. But he did not bring his action within five years after he came into the state; and therefore, according to the replication, if the acts of 1843 had never passed, he would have been barred. So it appears that if there had been no limitation law but that in force when he came into the state, or the limitation act of 1843, he would have been barred when he did sue. He was barred by the provisions of the law in force when the contract was made, when it became due, and when he came to the state,

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and by the law in force when he sued, both by the law applicable to the plea, and that applicable to the replication. It will not be overlooked by the court, that the plaintiff had, nearly or about one year after the latter act of limitations took effect, to sue before his protection under the saving of the former acts expired, which this court will not say was unreasonably short, and so much so, as to justify the court in pronouncing that the legislature clearly violated the constitution in regarding it reasonable.

But the plaintiff, by his replication, shows that he is unwilling his case shall be governed by either act of limitation, but claims the benefit of both—of the saving in the former, to show he was not barred when the latter took effect, and of the latter act, as to the time of limitation; it being six instead of five years, as in the former act.

The plaintiff claims by his replication to make a law out of both acts to suit his case; thus claiming for his protection longer time to sue than what those laws allowed to resident citizens. For, had he resided in the state when his cause of action accrued, his action would have been barred in 1840, under the former act; and he would have been barred under the latter act, whether his residence commenced in 1835 or 1839. The reason for giving the federal courts jurisdiction in case of non-residents is, that they shall have an equal and the same measure of justice as resident citizens, which the partiality of state courts might deny, not more or greater; so in state legislation as to courts, laws, remedies, actions, pleas, judgments, and executions, the non-resident can claim no more privilege than the resident; and it is not reasonable to presume that the legislature did intend by law to give him more than their own citizen. But if the patchwork of the replication, made out of two acts of limitation, is to stand, the plaintiff had ten years to sue after he came into the state, when our own citizen would not have had longer than six years, if he had resided in the state ever since 1835, holding a note due at that date.

Had the plaintiff replied that he came into the state in 1839,

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and had brought suit within five years after he came into the state, and in reasonable time after statute, there would have been some plausibility, some reason, and authority to insist that any law repealing his privilege before it expired, or giving him a reasonable time to exercise it, would take him by surprise, deprive him of his remedy, and was so far void, as it deprived him of his prior remedy. But this is not the claim the plaintiff in his replication makes; no, he claims a premium, in enlarged time to sue, beyond what was allowed the resident citizen as the reward of his immigration into the state. 1 How. 811; 2 *ib.* 613; 4 N. H. 473.

Once more, the statute of limitations is wholly remedial, and under the control of the legislature, or it is in part, or in *toto*; a law of the contract enters into it, and cannot be repealed, so far as the plaintiff's contract is concerned. Now, if it belongs to the former, there is no pretence to say that the former acts of limitation can be relied on in the replication; because no obligation of the contract is violated, the law being no part of it.

But if it belongs to the latter, and enters into and forms a part of the obligation of the contract, then the latter limitation law, so far as it infringes rights under the former act, and no farther, is void; and in this respect limitation laws do not differ from other laws which impair contracts. 4 Cow. 580; *Ruggles v. Keeler*, 3 John. 267; 5 Peters, 276.

The view taken, if correct, renders it unnecessary to consider the rejoinder, and the demurrer ought to have been sustained. But the rejoinder asserts that he has had six years within which to prosecute his suit since he came into the state, and in which he did not bring suit; so as to show whether the five years, as under the former act, or six years, as under the latter act, since the plaintiff's cause of action accrued, or since he came to the state, be properly claimed for the plaintiff, he has had the full benefit of the law—the same benefit as a resident citizen. It is therefore insisted, that if we regard the last act of limitation operating on the case, it was barred; if the plaintiff below relies on the former act, then he is barred

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according to its operation ; and if the latter act only partially repeal former acts, it still leaves about one year to plaintiff below to sue before he would be barred as a resident, placing him in the same situation as if he had been a resident. To decide otherwise would confound the distinction between right and remedy, and prevent legislation from making those alterations which the interests of society may require, without impairing the obligation of contracts.

Hall and Mason, for the defendant. The following argument was submitted in writing by Judge Mason :

Where a statute of limitations unqualifiedly repeals the previous statute, without any declaration in relation to those cases where the period of limitation is partially expired under the old law, the time has to commence anew under the new statute. *Piatt v. Vattier*, 1 McLean, 156.

But where the whole time shall have expired under the old law, the repeal of that law will not revive the cause of the action. 1 Hill, 333.

The courts will not give a statute of limitations a retroactive effect, unless the will of the legislature to that effect is clearly manifest. *Garrett v. Wiggins*, 1 Scam. 335.

It is beyond the constitutional power of the legislature, however clearly they may have declared their intention to that effect, to give a retrospective effect to a statute, so as to take effect upon a case where it would have the effect of barring the right of action at once. See *Piatt v. Vattier*, above cited.

These are plain and well-settled principles of law, and they decide this case in favor of the defendant in error.

If, when the act of 1843 was passed, the defendant in error had a subsisting right of action, and if that act of 1843 was not intended to be retrospective, he had six years from the passage of that act within which to bring suit, inasmuch as the act of 1843 unqualifiedly repeals the previous statute, without any saving of those cases where the time of limitation was partially expired.

Or if, in 1843, the defendant in error had a subsisting right

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of action, and if the act of 1843 was intended to operate retrospectively, the legislature had no power to give it such an operation as to the present case, because that would have the effect of annihilating at once the then existing right of action. The debt had been then due about eight years, having accrued in 1835.

But had the defendant in error a subsisting right of action at the time the statute of 1843 took effect? Most undoubtedly. It is true, the debt had been due eight years; but he had been a non-resident of the territory about one half of that time; and by the law in force prior to 1843, such time of non-residence was not to be reckoned as part of the period of limitation.

In our replication, therefore, we state, in the first place, that the cause of action accrued more than six years prior to the taking effect of the act of 1843, to show, that if that act is to apply to this case it destroys all remedy at once; and at the same time to show that our right of action was not dead prior to the taking effect of the new law, we state, that at the time the cause of action accrued, and until the 21st day of October, 1839, the plaintiff below was beyond the limits of this state.

We do not claim any rights under the old law, and only bring it in to show that when the new law took effect our right of action was still subsisting; for if it had been barred under the old law, the repeal of that law would not have revived it.

Where a statute of limitations contains no provision in relation to cases where the time of limitation has commenced running, the whole time must be computed from the date of the passage of the statute. 8 Wend. 664; 10 Wend. 365; 1 McLean, 156.

What we mean by leaving a reasonable time is, that there should be a reasonable time under the new law—not that the old statute left a reasonable time. Now the act of 1843, if it have effect on this case, entirely repeals all remedy; for the debt had been due eight years. The fact that he would have had two years by the statute of 1839, if unrepealed, is not material, because that law was unconditionally repealed.

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If the plaintiff has ten years after he comes into the state, it is because the law is thus written. But for the statute there would be much more time. If the defendant seeks the benefit of the limitation act he must take it as he finds it.

In the case in 8 Wend. 664, the widow had her lifetime in which to bring her suit, before the revised statutes were enacted. These statutes limited it to twenty years, As this time had previously elapsed, the court decided that she had twenty years after the taking effect of these statutes. They did not leave her the rights she would have held under the old statute, as would be the case in the present instance, if our client were limited to the balance of the limitation fixed by the act of 1839, instead of having six full years under the act of 1843.

Opinion by HASTINGS, C. J. The defendant in error sued the plaintiff in error, on a note drawn in the year 1830, due five years after date. The statute of limitations of Michigan was then in force, which statute was repealed in 1840. The statute of limitations of 1839 was repealed by the statute of 1843, which last statute is now in force, and absolutely repealed the statute of 1839, containing no saving clause for the benefit of debtors, as to the time which the repealed statutes had run, nor any saving clause as to creditors who should be absent from the state when their cause of action accrued. (1)

The pleadings are such as to directly raise the question, whether a debtor can have the benefits of the statute of 1843 until the statute shall have been in force six years, and shall have run six years after the cause of action accrued? To settle this question, we will be governed by several legal inferences, drawn from the nature and meaning of a statute of limitations, and the numerous decisions upon such statute.

1. That where a statute of limitations shall have been unconditionally repealed, without any saving clause as to former rights accruing and incomplete under the repealed act, the rights of parties shall be adjudicated in the same manner as if the repealed act had never existed. 1 Hill's R. 328, 332, and authorities referred to in that case.

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2. If a part of the time limited has run under a prior act, which is repealed by a subsequent act without a saving clause, the computation of time must be from the passage of the last act. 8 Wend. 664; 10 Wend. 365.

3. That a remedial statute shall be considered a rule of future action, and apply only to cases in future, unless by express provision the statute is to operate retroactively, and it cannot so act to the prejudice of vested rights. 10 Wend. 365; 8 Wend. 661, 664.

4. That when a statute has run the prescribed time, and is afterwards repealed, the creditor is barred, and no subsequent act of the legislature will cause the case to survive, the presumption of payment being complete and fixed. 3 N. Hamp. 378; 1 Hill, 333.

5. That the legislature has the power to enlarge the time for the statute to run, to repeal the statute which has run a part of the time prescribed, and to give past creditors the same length of time to prosecute their claims as future creditors, and to reserve to debtors the time which the repealed act has run. 1 McLean, 156; 1 Scam. 335.

Applying, then, the above principles to the present case, and it will readily be seen that the decision of the court below must be affirmed.

The defendant filed his rejoinder to plaintiff's plea, setting up that the plaintiff came into the territory on the 25th of October, 1839, and did not institute this suit until after the expiration of six years after his coming into the said territory of Iowa.

To which the plaintiff demurred. This rejoinder would unquestionably have been sustainable, if the legislature, in the act of 1848, had saved the time the repealed act had run, as was the case with the act of Ohio, 1810, repealing the act of 1804, on which was decided *Piatt v. Vattier et al.* 1 McLean, R. 157.

Much of the confusion, arising from the construction put on the statute of limitations, originates from the presence or absence of the different saving clauses.

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If the legislature choose to repeal all statutes limiting actions, their right to do so will not be questioned. If they pass other acts, repealing former acts, without reservation, it will be presumed they intend that in all future litigation a plaintiff shall not be bound, unless the full time limited shall have fully run, after the passage of the act.

Much reliance is placed, by counsel who argued this case for plaintiff in error, on the case of *Woart v. Winnick*, 3 New Hamp. 478. The decision in that case declares nothing more than that the right of parties litigant in actions actually pending shall not be impaired by a statute of New Hampshire repealing a former act of limitations. This decision does not conflict with the principle we have asserted. It cannot be that the legislature have not the power to enlarge the time in a statute of limitations, as well to contracts existing at the time as to all future contracts, so they do not impair rights vested in actions pending, or rights settled by the repealed act.

The statute provides, that when all other evidence shall fail of the payment of a debt, lapse of time shall raise a presumption of the payment.

The statute is denominated a statute of repose, and does not enter into the contract, or form a part of the consideration which induces the debtor to contract.

It is his duty, and in his power, to preserve evidence of payment; and he needs no legislative action to protect him in his rights. If he pay his debts, he can have them canceled; and if the legislature shorten or lengthen the time required to raise a presumption of payment, it impairs no rights of his, but protects the courts of justice from vexatious and annoying litigation.

Judgment affirmed.

(1) Vide *Rev. Stat.* 886, § 10.

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In exercising the common law right of abating a nuisance, the party should go no further than is absolutely necessary; and should commit the least practicable injury in accomplishing the object.

To justify a person in thus taking the law into his own hands, it should appear that the nuisance was a particular injury to his person or property, and operating prejudicially at the time of its abatement. It should be authorized only in cases of particular emergency, requiring a more speedy remedy than can be had by ordinary proceedings at law; and, in case of private nuisance, the remedy should be resorted to within a reasonable time.

If a mill-dam is erected so high, as to flow the water back upon a dam above it, under circumstances which might justify the injured party in abating it, by his own acts, he must confine his operations to the dam itself, and to such portions of it only as caused, and by dejection would remove the injury.

The right to have a stream flow in its accustomed course is universally incident to the property in the adjoining lands; and the riparian proprietor, on one side of a stream, cannot be justified in diverting its course from others, even by excavation through his own land.

A person, under legislative sanction, has a right to erect a dam upon a stream in which he is interested, as a tenant in common; but cannot be justified in so erecting as to encroach upon the rights of others.

Points decided by the opinion of Judge Hastings on the rehearing of this case:

Skunk river not being a navigable stream, the bed and waters between the banks, owned by different individuals, are common to both.

Tenants in common have a right to erect dams across such a stream, but not in a manner, or so high, as to injure other tenants in common; but if so erected, it becomes a private and not a public nuisance, and therefore should be abated within a reasonable time.

ERROR, to Henry District Court.

Hall and Mason, for the plaintiffs in error.

M. D. Browning and D. Rorer, for the defendants.

Opinion by GREENE, J. An action on the case, for diverting the natural course of a stream, and the consequent injury to the dam and mill of Brewer and Day, the plaintiffs below.

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It appears from the bill of exceptions that the plaintiffs built a dam on Skunk River, in 1841, and erected on its north bank a grist and saw-mill. The south end of the dam was connected with the main shore by a bar, or bank, through which the defendants dug a ditch close to the end of the dam, three or four feet deep, about the first of October, 1844; the water passing through this ditch wore a channel for itself, and thereby was drawn from said mills, and prevented them from running.

The defendants, Moffett and Kesler, adduced testimony, showing that they had a dam and mill on the same river, about a mile and a half above the dam of Brewer and Day; that they erected them in 1836; and that at certain stages the plaintiffs' dam caused the water to flow back upon their wheel, about one foot at the forebay. They also proved title to the land on the south side of the river, adjacent to plaintiffs' dam; and that the ditch they dug was on the main shore, at a common stage of water, and on their land.

Upon the trial, the court gave in substance the following instructions to the jury, to which exceptions were taken by the defendants:

1. In case the plaintiffs' dam was a nuisance to the defendants, they had a right to abate it, but no right to do anything more than abate the dam itself; and that if they went, even upon their own land, and dug around the end of the dam, so as to cause the channel of the river to flow there, to the detriment of the plaintiffs' possession, they were liable in this action.

2. In answer to an inquiry by a juror, that in case the dam should be regarded as a nuisance, whether the defendants were bound to abate it without delay, or not at all; the court ruled that the defendants could only abate the nuisance within a reasonable time, after which they would be limited to their remedy at law.

2. The defendants' counsel asked the court to instruct the jury, that if the digging done by defendants would not of itself have produced any injury to the plaintiffs, only in consequence

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of their previous wrongful act, that then they would not be entitled to a verdict. The court gave the instruction accordingly, but stated further, that if even in that case the defendants dug the ditch, with the intention of diverting the stream from its wonted channel, and it was so diverted, they were liable.

We will briefly notice the correctness of these instructions, in their order. One of the remedies recognized by law, is the right of a party injured to enter and abate a nuisance. But the abatement should be limited to its necessities; and with the least practicable injury be confined to the object which creates the grievance. To justify a person in thus taking the law into his own hands, it should appear that the nuisance was a particular injury to his person or property, and operating prejudicially at the time of its abatement. *Gates v. Blancoe*, 2 Dana, 158.

This summary method of redressing a grievance, by the act of an injured party, should be regarded with great jealousy, and authorized only in cases of particular emergency, requiring a more speedy remedy than can be had by the ordinary proceedings at law. If the nuisance alleged in this case was sufficiently urgent to justify the defendants in redressing the wrong by their own power, without the more commendable resort to judicial authority, they should at least have confined their operations to the dam itself; and to such portions of it only as caused, and by dejection would have removed, the injurious effects alleged.

The concluding portion of the first instruction referred to we regard as equally correct. The fact that the defendants diverted the water from the plaintiffs' mill and dam, by digging the ditch upon, and conducting the water through their own land, can amount to no justification. We think the authorities referred to, and others which we have examined upon this point, are quite conclusive.

The plaintiffs owning the land on the north side of the river, with prior occupancy at that point in using the water for hydraulic purposes, and having legislative authority to construct their dam, they felt entitled to, and were deeply interested in

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the uninterrupted continuance of the natural channel ; and had an especial, though not exclusive, right to the use of the water flowing through it. If the principle which appears to be well recognized is correct, that a person has no right to conduct a stream from its natural course to the injury of others, though he has title to the land over which it passes, a diversion in a case like this would we think be unjustifiable, even if done for the purpose of abating a nuisance.

The right to have a stream flow on in its accustomed course is recognized to be universally incident to the property in the adjoining lands. It is a right which the riparian proprietors on one side of a stream can, under no pretext, be justified in drawing from those on the opposite side, though accomplished by excavating a channel through their own land. By virtue of their ownership, they are entitled to the use of the water flowing by, or over their land in its natural current, without diversion, material diminution, or obstruction ; but no such proprietor has a right to divert or use the water to the prejudice of another.

Upon the principle involved in the second instruction of the court, directing that the party should be limited to a reasonable time within which he could properly abate a nuisance by his own mere act and authority, we have but little law before us. Bracton's view, that when the remedy by the act of the party is resorted to, it should be taken without delay, appears both reasonable and just in its application to a private nuisance. It is consistent with the reason of the law, which extends this extraordinary remedy to individual discretion. It being a self-constituting power, which should only be exerted in particular emergencies, when the security of life and property may require immediate action, a party should, if at all, avail himself of it at once. If he suffers time to elapse, within which he might have sought redress, or enjoined the injury before a judicial tribunal, the presumption reasonably arises that he has suffered no particular damage ; that he tacitly acquiesced in its continuance, and that there was no very pressing necessity for this harsh and summary resort.

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The reasons which induce our concurrence in the first instruction are in part applicable to the third. The right of the plaintiffs to build their dam when they did, cannot, we think, be seriously questioned, and hence cannot be regarded as a wrongful act. It appears that the land of the defendants on the south side of the stream, extended only to the bank, and embraced no other fee than that of a tenant in common to the soil in the bed of the river. The dam then, we presume, could have been on no portion of their land, beyond the bed of the stream, and was confined within the meandered lines established by the government survey. Prior occupancy, and legislative sanction, gave the plaintiffs the use and benefit of their dam, so far as they could be realized without encroaching upon the rights of the defendants. If the water was flowed back upon their wheels or land, they unquestionably had their action at law. Although the erection of the dam by the plaintiffs may have been in itself lawful, yet, if in its consequences it necessarily damaged the property of the defendants, they could recover reparation commensurate to the injury sustained. But if the injury amounted to a nuisance of such a serious nature as to justify an immediate abatement, they should still be confined within the rule for abating a private nuisance, and carry their operation no farther than was necessary to effect the object. And this clearly could not justify them in digging the ditch and diverting the stream from its wonted channel, without incurring liability to the plaintiffs, even if they had committed a prior wrongful act in creating a nuisance. We consider the instructions given to the jury by the district judge as substantially correct.

Judgment affirmed.

A rehearing was granted in this case on the following application, submitted by *Judge Mason*, for the plaintiffs in error:

The counsel for the plaintiffs in error move the court for a rehearing in the above-entitled case, under the sincere conviction that the decision of the case made at the present term is erroneous in this :

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1. The supreme court decided, that although the dam was a nuisance, Moffett had no right to abate it in any other way than by removing the dam itself.

We admit that such is the general rule, but insist that it is not applicable to the present case. The rule would only prohibit us from injuring any other property of the defendant in error, but does not require us not to dig around the dam on our own land; especially when this is done in self-defense, against a wrongful act of his. Thus, it is a general rule that I shall not strike my neighbor. But suppose he assaults me; there is then an exception to the rule: and the law in such a case requires me not to proceed beyond the bounds of reason in punishing the aggressor, in the same manner as it requires me, in the abatement of a nuisance, not to cause any unnecessary destruction.

But I may evade the effect of the wrongful act of my adversary. I may dodge his blow, instead of returning it. I may dig around on my own land, instead of destroying his dam. If a man hurls a missile at me, I may jump out of the way, although the effect may be that the missile will thereby kill one of his own children. The original wrong-doer, in those cases, is responsible for the consequences. At all events, he has no ground of complaint.

In the case of a person assaulting me, I am not watched very closely by the law, but am given a considerable latitude. I must go clearly beyond the bounds of reason before I make myself liable. The rule is the same in the abatement of nuisances. See 3 Black. Com. p. 5, n. 6.

Why should the law be over jealous in guarding this private remedy, and keeping it within strict limits? The party has only done what the law would have done for him, after the public and the courts had been seriously taxed in time and money. Where the act has been done quietly, and where it is restricted within reasonable limits, I see no reason why it should be viewed with judicial disfavor. It is as much under the supervision of the courts as though he had filed his bill in the first instance for the abatement of the nuisance. The only

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Conference is, that in the one case he files his bill, and the court thereupon directs the abatement of the nuisance: in the other, he abates the nuisance, and the courts supervise the act, and only sanction it in case he has gone no further than they would have directed.

2. But whatever may be thought of the soundness of the views above expressed, we think the position is sound, that the party aggrieved by a nuisance has the right to abate it for twenty years, if it be merely a private nuisance, and for a longer period if a public nuisance; and that the court erred in deciding that the right to abate must be exerted without delay, or not at all. The only authorities giving the least countenance to such a conclusion, are the allusions in the law of easements to a saying of Bracton, and the reason given by Blackstone for permitting the remedy at all.

In the case of the abatement of a nuisance, Bracton says, "it must be done without delay." If that proposition is law, is it not strange that it is not indorsed by the author who quotes it? But instead of doing so, he all along treats the right as coextensive with that of obtaining a remedy at law. And so with all the other authors. See Angell on Water Courses, 136, and *Hodges v. Raymond*, 9 Mass. 316. The supreme court of New York regard the abatement of a nuisance as merely a preventive remedy, and classed with the right of entry upon lands, or of recaption of personal property, where the necessity of immediate action does not exist. See *Pierce v. Dart*, 7 Cowen, 612.

Blackstone, it is true, gives as the reason why this remedy is permitted, that evils of this kind require an immediate remedy, and cannot wait for the slow process of the law. This may be one of the reasons, but still it does not limit my right of redress: and that same author, without qualification, treats the subject as though the unlimited option were left with me to select which of the two remedies I please. 3 Black. Com. 220. The nuisance may have existed for years without my ever having experienced any special inconvenience from it. When it becomes annoying, is my previous forbearance to limit my rights?

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Brewer's dam might have produced no inconvenience, except at intervals. Every fresh inconvenience would then be a new grievance, for which he might assert his natural remedy, notwithstanding his previous forbearance. Suppose A has been in the habit of assaulting B for three years whenever he met him, will this put it out of B's power legally to defend himself whenever his courage or his strength will permit? The continuance of a wrong becomes daily a new wrong. Brewer's dam was daily a fresh nuisance, which Moffett might abate whenever he was awake to his rights, or aroused to a determination to assert them.

As direct authority upon this point, we refer to the case of *Colburn v. Richards*, 13 Mass. 420. There the nuisance (which was the building of a dam) had existed for seven years, and had been a nuisance every winter during that period; still the court sustained the right of the party aggrieved to enter and abate the nuisance after the lapse of that length of time.

But the most positive case on this point is that of *Renwick v. Morris*, 3 Hill, 621. In that case the court decide that a public nuisance may be abated after the lapse of twenty years. They go on further to say, that they are aware of no case denying that the remedy by abatement is, in all respects, concurrent with that by indictment. That, it is true, was the case of a public nuisance; but wherein is the difference, so far as it concerns the question we are now considering? Cannot a person, aggrieved by a public nuisance, appeal to the law for redress as readily as for a private nuisance? Why should not his right to a private remedy expire after he has had a reasonable time to invoke a legal remedy, as well in the case of a public as of a private nuisance? The difference between the two kinds of nuisance, so far as remedies are concerned, is that the one permits of abatement or indictment, the other of abatement or action. In a private nuisance the remedies expire after twenty years, in a public nuisance there is no such limitation; but abatement in each is one of two concurrent remedies—concurrent in all respects.

If, when a person obstructs the public road, no length of

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time takes away my right of private interference by abatement, can there be any good reason why I should be deprived of a like right when the obstruction is to my private lane, up to the time that prescription has ripened his wrong into a prescriptive right?

3. The remaining error assigned by us is set forth in the concluding portion of the bill of exceptions. The court charged the jury that the plaintiffs below would not be entitled to a verdict, provided the act of Moffett would have produced no injury but for the previous wrongful act of Brewer; but stated further, that "even in that case, if the defendant, Moffett, dig the ditch with the intention that it should have the effect of diverting the stream from its wonted channel, and the stream was so diverted, he was liable." The point here raised is this, that if a person does an act which is innocent in itself, can you inquire into his intention? A man may do an act with the most diabolical of motives; still, until that motive has ripened into the commission of some act forbidden by law, he is not answerable either civilly or criminally. Do you, in civil actions, ever inquire into intent in determining whether the defendant is liable? We sometimes make that inquiry in order to determine whether to give exemplary damages, but never I believe for the purpose of fixing liability.

On this last point the argument below was so brief and imperfect, that the supreme court seem to have misapprehended it. At all events, the point does not seem to have been decided, as will appear from a reference to the opinion filed in the case. We should be glad to have that point settled.

The following opinion was delivered on the rehearing of this case by

HASTINGS, C. J. This case having been again argued on rehearing, and many additional authorities submitted, it is due to the importance of the case, and the zeal and ability with which the plaintiffs' counsel have investigated the rights of the plaintiffs in error, that another response should be made, asserting what we still think to be the law of the case. And

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the first and most important question to be settled is whether the Skunk river is a navigable stream, and as such a common highway under the usual definition of navigable streams in the western states; for upon the solution of this question depends the character of a nuisance caused by erecting a dam across the same.

This river was declared navigable by an act of the general assembly of 1847, which cannot however change the rights of the parties at the time of the commencement of this suit. The river is reported to be a shallow fresh-water stream, having its source within the boundary limits of this state, and discharging its waters into the Mississippi; and has none of the usual natural characteristics pertaining to streams denominated navigable or common highways, nor does it appear to have been used for such a period of time in boating or navigation of any kind as to render it such.

If it were a navigable river, or had been declared to be such by statute, it would fall under that class of streams which are declared navigable and free by the ordinance of 1787, which provides that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places, should be common highways, and forever free."

The same is declared in the act of the 3d of March, 1811, as to the navigable waters in the territory of Orleans and Louisiana.

The Mississippi and Missouri rivers, and navigable waters running into them, and the carrying places between them, are made common highways by the act of the 4th of June, 1812, providing for the government of the territory of Missouri. By the acts of May 18, 1817, 3d of March, 1803, and 26th of March, 1804, it is provided "that navigable rivers and streams shall be and remain public highways. Streams not navigable, having the opposite banks owned by different persons, shall have their beds and waters common to both."

The bed and waters then of this river were common to both parties in this case, "the opposite banks" being owned by them. If there had been no acts of congress defining

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their rights, the position of the plaintiff in error would be correct, that each proprietor would own the river and its bed to the thread of the stream, and Moffett then would have the right to abate any dam erected on his soil. By the acts of congress referred to, he and Brewer are tenants in common of this river and its bed, each one having a right to erect dams across the same, but not however to the detriment of the other's rights. Brewer had a right by reason of his common interest to erect his dam, but not so high as to injure Moffett's mill above; and it was Moffett's right to prostrate so much of Brewer's dam, as to leave him in the enjoyment of his prior rights, and no more. Angell on Water Courses, 138.

Such being the rights of the parties, and there being no evidence before the court, nor any statute submitted showing that this was a public highway when the dam was erected, and when this action was brought, the nuisance, if any, of Brewer, was a private nuisance, and the court below did not err in instructing the jury that Moffett should abate the same in a reasonable time, or be left to the usual legal remedies.

This instruction cannot be error, if it be admitted that Moffett could not exercise his right of abatement at an unreasonable time, and when the reason for resorting to this remedy had failed. It is because of the delay of legal proceedings that this remedy is given. In the case of *Hodges v. Raymond*, 9 Mass. 318, 319, the court say: The remedy for this nuisance would have exposed Raymond to most inconvenient delay, as his operations were of great importance to him. The reason given by Blackstone for this summary remedy, the dictum of Bracton, and indeed the very necessity of such a remedy, convince us that the court did not err in this instruction. The case cited from 13 Mass. 420, presents a case of the exercise of this right, years after the cause of the nuisance had been erected; but the injury seems to have been only periodical, and never to have prevented the use of the mill, until the 25th of November, 1815; nor does it appear that the question here presented was decided in that case. "In the case before us," said Ch. J. Parker, "the whole

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stream was stopped, or at least so much of it as to render the defendant's mill entirely useless." This does not appear to have occurred before.

The plaintiffs' counsel seems to rely with more confidence on the error assigned to the last instruction of the court, where the court says, "that if, however, even in that case, the defendant Moffett dug the ditch with the intention that it should have the effect of diverting the stream from its wonted channel, and the stream was so diverted, he was liable."

It is argued that Moffett should not be liable in a civil action for an intention to do an injury; but it appears the court followed the intention with the consequent injury, by adding "and the stream was so diverted."

The counsel do not contend that Moffett would not be liable for digging a ditch on his own land, and thus changing the channel of the river. To contend for such a doctrine would argue that any riparian owner on a stream would have a right to appropriate the same to his own use, and convert a small river into a canal, and entirely annihilate the natural course and bed of the stream; but they contend that although the digging of the ditch was a wrongful act, yet it was caused by Brewer's own acts, and the case of personal self-defense is urged as a parallel. Although a person can ward off the blows of an assailant, it is at the same time admitted that he will be liable for an excessive battery in self-defense; so, although Moffett had a right to defend his mill from the injury caused by Brewer's dam below, by prostrating so much of the same as caused the injury, he had no right to divert the river from its natural channel. This was excessive, for which he was liable.

Judgment affirmed.

McCarver v. Nealey.

McCARVER *et al.* v. NEALEY.

In a deposition, the answers of a witness should be substantially responsive to the interrogatories.

Where a demand is placed in charge of an attorney to collect without limitation, he is authorized to receive the money after procuring a judgment, and to enter satisfaction. If the client assigned the judgment to a third party, and after the transfer the judgment-debtor paid the same to the attorney of record, it was held that, as the debtor had no notice of the assignment, he should be protected from further liability.

An attorney has no right to receive anything but money in satisfaction of a demand placed in his hands for collection, unless especially authorized to do so by his client.

IN EQUITY. *Appeal from Des Moines District Court.*

Grimes and Starr, for the appellants.

David Rorer, for the appellee.

Opinion by GREENE, J. On the 4th of June, 1841, a judgment was rendered against James W. Nealey in favor of Morton M. McCarver, for the sum of \$155 47. On the same day an assignment of it, purporting to be for value received, was made upon the margin of the judgment to Ira Todd and Sons. It appears that Joseph D. Learned, Esq., was the plaintiff's attorney of record. He caused execution to be issued, and thereupon entered into an arrangement with Nealey, by which he, as attorney, gave him a receipt in full discharge of the judgment. Subsequently Todd and Sons, the judgment assignees, procured the issue of another execution, which was enjoined by the proceeding now before us, upon the complaint of *Nealey v. McCarver and Todd & Sons*. Upon a full hearing in the district court the injunction was decreed perpetual, and an appeal thereon taken to this court.

A preliminary question arises on the motion of complainants' counsel, to exclude such portions of J. D. Learned's deposition as are not responsive to the interrogatories. The necessity of

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having the answers responsive to the interrogatories is too well established to admit of the slightest doubt. We would not require a technical adherence to this rule ; but it certainly should be substantially followed. The words, "by the direction of McCarver," in answer to the second interrogatory, which inquires merely as to his knowledge of the judgment, were properly excluded by the court below under this rule ; and so also was that portion of the answer to the third cross-interrogatory, in which it is asked, if Nealey did not pay as required by deponent, and if he had not a writ of *fi. fa.* against him ; to which he answered, that he was authorized to receive the amount of the judgment and apply it to his own use. It is clear that this answer is substantially irresponsible.

It is contended that Learned's authority as attorney of record ceased on the rendition of the judgment ; and that he had no right to receive the pay or give a receipt in satisfaction. The practice of Kentucky is referred to in support of this position. It has been the recognized custom, since our first territorial organization, for attorneys to control demands placed in their hands till finally collected. This custom was recognized by an early statute, which conferred the exclusive authority upon the attorney of record for the judgment claimant to enter satisfaction. On obtaining a demand from a client, it is usually specified in the receipt given by the attorney that the demand is taken for collection. This rule has been so generally recognized and adopted in Iowa, that to reverse it might work great injustice to parties. But it is alleged that, even if he should be regarded as the attorney of McCarver after the rendition of judgment, his authority as such was not transferred to Todd and Sons after the assignment, unless recognized by them ; and that, therefore, the payment of the judgment to him was unauthorized, and should not release Nealey. This conclusion we should recognize as correct, if it appeared that Nealey had received notice of the judgment assignment. Without notice, he should be protected as an innocent party to the transaction.

The testimony of J. W. Nealey, in reply to defendants'

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interrogatories, discloses that Learned received in payment from him a demand against himself for about fifty dollars, an order on one Russell for an unknown amount, which was paid, and the balance in money.

The principle is not controverted that an attorney has no right to receive anything but money in satisfaction of a demand placed in his hands for collection, unless especially authorized to do so by his client. And it is equally well settled, that if he applies such a claim in payment of his own debts, his client is not bound thereby, and may still proceed against the defendant. *Gullet v. Lewis*, 3 Stew. 23; *Cost v. Genette*, 1 Porter, 212, 34; *Craig v. Ely*, 5 Stew. and Porter, 354; *Tankersley v. Anderson*, 4 Desaus. 45; *Smock v. Dade*, 5 Rand. 689; *Langdon v. Potter*, 13 Mass. 320.

We find it difficult to ascertain the precise amount that Learned, as attorney, received in money on the payment of the judgment. His deposition states that it was settled by setting off a demand which Nealey had against him. From the responsive answer of Nealey, to which, from the state of the testimony before us, we give particular credence, it is rendered quite certain that all but about fifty dollars was paid in money. The order on Russell for cash of Nealey's was paid, and should be regarded as so much money in the hands of Learned.

It is therefore our opinion, that Ira Todd and Sons are entitled to recover from James W. Nealey, on the execution, the sum of fifty dollars, and that the injunction be so far dissolved as to enable the recovery thereof, and rendered perpetual as to the balance of said judgment and execution.

The decree of the district court, declaring the injunction perpetual, will be changed in conformity with this opinion.

Dinwiddie v. Roberts.

DINWIDDIE v. ROBERTS.

A bill is bad on demurrer, which merely charges that the defendant was about to commit a flagrant injury, in setting up a claim, unauthorized by law, to establish a highway through his cultivated lands, without alleging that he had perpetrated any injury, or showing in what connection or way the injury was about to be committed under legal sanction; or that defendant was insolvent, and unable to answer in an action at law for damages. But the supreme court has a discretion over the question of jurisdiction in such a case, where the party has waived the objection by pleading.

On opening a road through cultivated lands to the injury of the owner, he is entitled to adequate compensation.

IN EQUITY. *Appeal from Des Moines District Court.*

J. C. Hall, for the appellant.

David Rorer, for the appellee.

Opinion by HASTINGS, C. J. This was a bill in chancery, in which it appears that the appellant, who is the defendant in the bill, under pretense of some legal authority not described in the bill, was about to commit a flagrant injury; that he set up a claim to establish a public highway through the cultivated lands of the complainant, without authority of law.

It does not aver that the defendant had entered upon the lands, or had done anything which proved the complainant's danger of suffering an irreparable injury, except the setting up of such illegal and unjustifiable claim, under pretense of constructing a public road.

The bill does not connect the acts of the defendant with the official authority of the territory, showing that the injury was about to be inflicted under the supposed sanction of law, and by direction of the board of commissioners of the county of Des Moines, who are authorized by law to establish and open public highways; nor that defendant was acting, in the premises, in the capacity of a road supervisor, and as such was about to do

Dinwiddie v. Roberts.

the unlawful acts complained of, but describes the mere claim of an individual to a right to do a great private injury.

There is no averment that the defendant was insolvent, and unable to respond to an action at law for damages. Nor does the bill describe the injury about to be visited upon the complainant to be such that money could not compensate for the same, as was the case in *Bonaparte v. Camden Railroad Co.*, 1 Baldwin, C. C. 231.

The bill, therefore, was clearly bad, on demurrer, for substantial defects, and that the defendant could take advantage of it on the hearing, there can be no doubt. See 2 Amer. Ch. Dig. 50, § 32. But this court has a discretion over the question of jurisdiction in this case, if from the state of the pleadings equity and justice require that jurisdiction should be entertained. The facts stated in the plea and the transcript of the proceedings of the board of commissioners, offered as evidence to support the pleas, show that this court ought to entertain jurisdiction in some manner, if it can be done according to the rules of practice in chancery. Had the defendant answered, denying the averments in the bill, we would not hesitate to dismiss the bill unconditionally. But he has stated such matters in his pleas, which, if added to the bill, and the bill should be amended accordingly, a court of chancery would not hesitate to entertain jurisdiction.

In *Burroughs v. McNiell*, 2 Dev. and Batt. 217, American Ch. Dig. 51, § 44, it is decided, that if the objection has not been taken in the pleadings, but the defendant has expressly submitted to the jurisdiction of the court, by praying it to decide on the question of his liability, the objection must be regarded as one not of strict right, but addressed to the sound discretion of the court.

We will not now express any opinion as to the validity of the proceedings establishing the road in question. If the public convenience requires that a road should be opened through the cultivated lands of the complainant, before the same is opened the complainant should receive an adequate

Wiley v. Arnold.

compensation for the injury suffered thereby. This right is guaranteed to him by the organic acts, and wisely incorporated into the bill of rights. If no compensation can be awarded in money for such injury, the defendant and the board of commissioners of the county of Des Moines should be forever restrained from committing the injury.

The decree of the court below on the bill, as it now stands, must be reversed, and the complainant have leave to amend his bill in the court below, and the injunction continued for the further action of that court.

WILEY *et al.* v. ARNOLD.

Upon finding a verdict, the jury should assess damages, and not the court.

ERROR, to Des Moines District Court.

Hall and *Mason*, for the plaintiff in error.

Grimes and *Starr*, for the defendant.

Opinion by GREENE, J. The entry of judgment below shows that the jury found for the plaintiff, but did not assess the damages. This was done under the direction of the court by the clerk. The right of the party to have the jury assess damages, needs no discussion. Any incroachment upon this right is manifest error.

Judgment reversed.

Bretney v. Jones.

BRETNEY v. JONES.

Objections to the sufficiency of an attachment bond are cured by statute, on filing a sufficient bond within a reasonable time after the objections are raised; but such objections cannot be originally urged in the supreme court.

A substantial compliance with the statute is sufficient in notifying an absent debtor of attachment proceedings against his goods, if the requisite notice is published within thirty days after the advertisement is delivered to the plaintiff.

Though the statute regulating proceedings *in rem* should be strictly pursued, still the strictness should not be such as to suspend the law, and leave the attaching creditor remediless.

ERROR, to Henry District Court.

This was an action of assumpsit and attachment. The attachment bond appears to have been filed on the 31st July, 1845; but was approved by the clerk of the Des Moines district court, instead of the clerk of Henry district court. Notice of the proceedings was published in the Territorial Gazette, as appears by the publishers' sworn certificate, for six consecutive weeks after the March term of 1846, of the district court of Henry county. Proof of publication was filed, and the plaintiff recovered judgment at the following September term of said county. The writ of attachment was returned, and declaration filed at the October term, 1845; but the order of publication was not made till the March term, 1846. It is objected that the plaintiff was not sufficiently vigilant in publishing notice of the pendency of the suit; that the order should have been made at the October term, 1845, and that the notice should have been published within thirty days thereafter. *Rev. Stat.* 81, §§ 20, 21. The time of holding court in Henry county was changed by the legislature in January, 1846.

M. D. Browning, for the plaintiff in error.

J. C. Hall and *H. W. Starr*, for the defendant.

Opinion by HASTINGS, C. J. The objections to the suffi-

Bretney v. Jones.

ciency of the bond in this case are cured by the 31th section of the act regulating writs of attachment, which provides that no writ of attachment shall be quashed on account of any insufficiency in the bond, provided a sufficient bond be filed within a reasonable time after objections taken.

The record does not show that objections ever were taken in the court below; and if the bond be now insufficient, the party must seek his remedy against the clerk. As to the publication of notice, it seems the plaintiff was as vigilant as creditors usually are in prosecuting demands to judgment, and that he substantially complied with the law.

The plaintiff should not have been sent out of court by reason of the intervening acts of the legislature changing the time of holding courts.

Nothing has been more common under our territorial legislature than acts of the kind; and if such acts were construed strictly, such construction would probably result in a suspension of the laws for the collection of debts against non-resident debtors. We admit the doctrine claimed, that proceedings *in rem*, under a statute, should strictly comply with the requisition of the same; but the strictness should not be such as to suspend the law, and leave an attaching creditor remediless, or of putting him out of court with cost. While a court will vigilantly protect a debtor against the injury of an attachment illegally prosecuted, the creditor ought to be protected, if he substantially comply with the requisitions of the law. We think therefore the objections as to the notice are not well taken, that the defendant cannot have suffered from the delay, and that the 21st section of the attachment act does not require the notice to be published within thirty days after the return term of the court, but thirty days after the advertisement shall have been delivered to the plaintiff.

The judgment is substantially a judgment *in rem*, the sum recovered seems to be for the amount sworn to in the affidavit, and interest thereon to the time of rendition of the same, which was correct.

Judgment affirmed.

Chapman v. Arnold.

PORTER *et al.* v. GARRETT & Co.

Where the record of a case is too defective to justify a decision, the court will order a *certiorari* to perfect it, without a motion from counsel.

ERROR, to Henry District Court.

PER CURIAM. The transcript in this case, as certified by the clerk, contains only the orders made in the district court. It is so defective, that we cannot, with a proper regard to the rights of parties, entertain jurisdiction, nor decide the questions involved, without a more complete record. We have therefore concluded to order a writ of *certiorari* to the clerk of the district court of Henry county, to send up a full transcript of the record and proceedings in this case.

CHAPMAN v. ARNOLD.

Where a proceeding in chancery appears to have been brought to the supreme court by writ of error, under territorial laws, the case will be decided upon such errors only as are assigned, and appear of record.

The evidence in such a case is no part of the record, unless embraced in a bill of exceptions.

Unless the contrary affirmatively appears, it will be presumed that a decree in the court below was justified by the evidence.

IN EQUITY. *Error, to Des Moines District Court.*

Grimes and Starr, for the plaintiff in error.

D. Rorer and J. C. Hall, for the defendant.

Opinion by HASTINGS, C. J. This case is one of those remaining undisposed of in the late territorial supreme court;

Chapman v. Arnold.

and a question is raised whether it was brought into that court by appeal or writ of error. We find the first paper in the record is a writ of error, issued from the territorial supreme court to the clerk of the Des Moines district court, commanding him to return the record to said supreme court, for errors alleged in said record. The clerk of the Des Moines county district court appended a full transcript of the record to said writ of error, and appends to the transcript the usual certificate of a return to the writ.

It cannot be doubted that the case as it now stands is in this court on error, and not by appeal. Under the territorial jurisdiction, a party could on decrees in chancery sue out a writ of error, or prosecute an appeal; and although the party seems, in the rendering of the decree in the court below, to have given notice of appeal, still we have no other evidence of his intention to appeal,—no evidence of the usual notices served, or precept filed with the clerk to send up a transcript.

Nor do we find this case in this court bearing any evidences of appeal, except the fact above mentioned as to notice given at the hearing below. This record, then, being a return to a writ of error so certified and attached to such writ, and errors being assigned on the same, we are not permitted to doubt that the plaintiff in error elected, of his two remedies, the proceeding by writ of error.

It may be well to suggest, that since the adoption of our state constitution, no chancery case can be removed to this court by writ of error, but by appeal only.

Limited, then, to the inspection of the record, we will proceed to examine the same as to the several errors assigned. It will be readily seen that the depositions are no part of the record, there being no bill of exceptions embodying the evidence in the record. We are bound, then, under the decision so often reiterated in this court, that no errors are to be presumed in a record, to infer that the court below had sufficient evidence to authorize the rendition of the decree. It must also be presumed that the court did not err in not dissolving the injunc-

McCoy v. Hughes.

tion wholly, as averred in the third assignment of errors. For aught that appears in the record, the motion to dissolve was resisted upon evidence then submitted. If the complainant proved the averments in his bill by the requisite number of witnesses, or by other sufficient testimony, he was entitled to the decree.

If he did not support the bill against the answer by sufficient evidence, the defendant below could have made it manifest by a bill of exceptions. The decree of the court below is therefore affirmed.

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McCoy v. HUGHES.

Where M. and H. each claimed eighty acres of land, agreeably to original claim lines, and it appearing by preponderance of proof, that H. made an arrangement with M., by which the latter was to purchase the eighty acres at the land sales; that H. offered him a sum of money equal to his portion of it, but M. declined receiving it, saying he had money enough, that he would purchase the land, and call for the money when he wanted it; that M. purchased the land accordingly in his own name, and H. depending upon the arrangement with him, made valuable improvements upon his portion of it, within the presence and knowledge of M., who had both before and since the purchase recognized the right of H., and had expressed a desire to purchase his portion of the eighty acres; and that H. had also tendered the amount of the purchase-money and interest, since the purchase and before this suit was commenced, with a deed for M. to execute, but he refused to receive the one or execute the other. Held, that as H. had deposited the amount of the purchase-money and interest in court for M., that the former was entitled to a decree against the latter for the portion of the land which he had originally claimed; also held, that H. was entitled to this recovery, although the facts proved did not fully come up to the facts alleged in his bill; also held, that the facts established would take the case out of the statute of frauds for the advancement of equity; and also held, that M. might properly be regarded as agent or trustee of H. in the transaction.

McCoy v. Hughes.

IN EQUITY. *Appeal from Henry District Court.*

C. Walker and *W. H. Wallace*, for the appellant. Mr. Walker submitted the following authorities: 1. That the arrangement between the parties did not amount to a contract to convey. 2 Story's Equity, § 751. 2. That the transaction cannot be taken out of the statute of frauds. 2 Story's Equity, §§ 980, 1195, 1198, 1201. 3. That complainant should not recover, because he does not offer in the bill to pay purchase-money. *Libert v. Kelly*, 6 Monr. 673; *Clark v. Hall*, 7 Paige, 382.

Hall and *Mason*, for the appellee, cited 2 Story's Equity, 62, 69, 740; 14 John. 32; 1 John. Ch. R. 284; 2 *ib.* 339, 369; 1 Blackf. 294; 2 Cowen and Hill's Notes, pp. 287, 340, 350; 1 Paige, 212; 9 John. 466; 1 Rand. 169.

Opinion by GREENE, J. The bill in this case states, that in March, 1839, the complainant, Hughes, bought a claim and made valuable improvements thereon; a part of which were on the west half of north-west quarter of section nine, township seventy-one, north of range six, west: that such claims were recognized by the community as giving the claimant a right to purchase at the land sales: that the claim, having been made prior to the survey of public lands, was not bound according to the congressional subdivisions; but by amicable arrangement the claims were to be preserved as originally made, by one claimant purchasing the land by legal subdivisions, and deeding subsequently to the meritorious claimants; that complainant made an arrangement with the defendant, McCoy, by which he was to purchase the said tract of land, and then deed to complainant the amount embraced within his claim, and at the same time offered him a sum of money sufficient to pay for said amount; that McCoy did not receive the money, stating that it made no difference, as he had money enough; that he would purchase the land, and if he wanted the money he would call for it; and that he had no claim to complainant's part of the land, and only wanted his own. That

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soon after the defendant purchased the land, complainant relying upon said arrangement, commenced improving his portion by enclosing it with a fence; that the defendant was present, knew of the improvement, and made no objection, but spoke of the land as complainant's, and desired to purchase it of him; that at the same time he promised to make a deed to complainant for his share of the land. The bill also alleges that complainant had tendered him the amount of the entrance-money and interest, and a deed ready for execution, but still the defendant refused to convey the land to him.

The answer expresses ignorance of many of the facts set forth in the bill, but admits a conversation about purchasing the land; still denies that he was to do so only upon the condition that complainant should furnish the money at the land sales, but that it was neither furnished nor offered; denying that after purchasing the land, he agreed to convey to complainant, or called the land his, but admitting that upon one occasion he expressed a desire to buy his good-will of the same, and that a deed was offered for him to sign for complainant, and some money tendered, which he refused. The defendant, in his answer, set up the statute of frauds against the relief asked by the complainant.

The depositions of several witnesses prove that the complainant had made desirable improvements upon the land; and that the defendant had recognized his right to it, both before and since the purchase, and had expressed a desire to buy the land; that he was present when some of the improvements were made, offered no objection, and claimed no right to the land. The testimony also shows that the purchase-money was tendered to defendant before the sale, upon which occasion he said that "it made no difference," and also that the purchase-money and interest had been tendered to him since the land sales.

The district court decreed a conveyance of the land to complainant; the entrance-money and interest having been deposited with the court for the defendant.

The first position assumed by defendant's counsel is, that

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the agreement alleged in the bill is not proved as law requires; that the "*allegata et probata*" do not correspond. It is true, that the agreement to purchase and deed the land, as set forth in the bill, is not so fully sustained by testimony as to remove all doubts upon some of the stated facts; but still we think enough is proved to establish an equitable, and in many respects a strong case for complainant. Nor can we see that the facts alleged, and the facts proved, are so materially variant as to justify a reversal of the decree. The objection being one of form rather than of substance, a court of equity will overlook it, and act upon substantial merits. In this case there is clearly no substantial misdescription of the premises, nor material irrelevancy in the proof. All are clearly ascertainable, and sufficiently identified, to justify a court of chancery in enforcing a specific performance. In arriving at this conclusion, we consult not only the peculiar nature of the transaction, common only in frontier and new settlements, and the customs recognized and established in such settlements, but also the relation in which the parties and their interests stood to each other at the time the arrangement was entered into.

2. It is contended that if the contract alleged in the bill is established by proof, it is within the statute of frauds, and void. This objection presents a more serious difficulty in the case. It is obvious that courts of equity are equally bound with courts of law, in the observance of this statute; but it is equally obvious, that for the purpose of administering justice, subservient to the object of the act, equity has interfered in some cases which were within its meaning and restraint. Whether such an interference would be justifiable in this case it is perhaps unnecessary to inquire, especially as the circumstances recited in the bill, and sustained by proof, place the arrangement relied upon beyond the reach of the statute.

A parole contract is often specifically enforced by a court of equity, where there has been a part performance. This the plaintiff sets up, to take the case out of the statute; and al-

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leges that this part performance consisted in the defendant's acquiescence in his right and possession; in the valuable improvements the defendant encouraged him to make upon the land in question, and in his efforts to purchase the same. It appears to be within the general course of equitable relief, that where the person who has the legal title to land suffers another to go on with improvements, under the expectation of a conveyance, raised in him by the acts, encouragement, or assurance of the owner, that the transaction will be taken out of the statute of frauds, and the deceiving party be required to make the conveyance, and realize the expectation he has raised. *Parkhurst v. Van Cortland*, 14 John. 35; 1 John. Chan. R. 273; *Roberts on Frauds*, p. 132. It is laid down in *Roberts on Frauds*, that this encouragement may not only be given by "words and assurances," but simply by "looking on in silence." The preponderance of proof in this case leaves but little doubt that all these inducements were put forth by the defendant, which encouraged the complainant to go on with the improvements. He was not only encouraged by these hopes, but also in the defendant recognizing his right to the soil, by endeavoring to purchase it of him.

It is urged by complainant's counsel, with much reason, that McCoy acted as complainant's agent or trustee in entering the land at the sales. The nature of the transaction; the claim the plaintiff had in the land before the purchase, and his acquiescence in the arrangement to let the defendant enter the same; the confidence he manifested in obtaining the deed, and the general tendency of the proof, give force and weight to this consideration, and show strong instances of encouragement, both tacit and express, to rely upon his equitable right in the land, and to make upon it improvements, and incur expenses. Principles of the soundest morality, sanctioned by the rules of justice and equity, require relief against such fraud, and justify the decree of the court below.

Decree affirmed.

Morris v. Stuart.

MORRIS'S ADMS. v. STUART'S ADMS.

Where the equities of the second bill are materially different from the first, although the origin of both are the same. Held the adjudication of the first is no bar to the second.

Where a given number of acres are sold off of the west side of a quarter section of land, the premises should be surveyed into a parallelogram.

Where a given number of acres are sold out of a corner of a quarter section of land, the premises should be surveyed into a square.

IN EQUITY. *Appeal from Des Moines District Court.*

This was a bill in chancery for a specific performance. Decree in the court below for the complainant. The principles decided can be sufficiently gathered from the opinion.

M. D. Browning, for the appellant.

D. Rorer, for the appellee.

Opinion by HASTINGS, C. J. A plea is filed to the bill by two of the defendants, setting up that the subject matter of the bill was adjudicated in a bill filed by Stuart in his lifetime, against Morris during his life, for the conveyance of the same premises. The first bill sets up a contract, partly verbal and partly written, claiming the specific performance of the same for the conveyance of the premises in controversy. The present bill prays for the conveyance of the same premises, except about five acres, charging the defendant as a trustee, in whom existed the mere legal title to the premises, the same having been purchased of the government with Stuart's money, and, for convenience, entered by Morris. The deposition of Derbyshire supports the last bill, but not the first. The equities are materially different. The subject matter, then, of the present bill is not *res adjudicata*, as set up in the pleas. The pleas will therefore be overruled, and the case will be disposed of on the answers of the remaining defendants.

Morris v. Stuart.

It appears from the deposition of Derbyshire that Stuart, on the 24th day of March, 1840, paid defendants intestate, Morris, \$50, to be invested in the entry of a tract of land which Morris and Stuart each had an interest in. That if Stuart's interest, on an accurate survey, would not require \$50, Morris was to refund the surplus; and if more than that sum, Stuart was to advance a further sum. We will presume the land was entered at \$1 25 per acre, as that was the minimum price of the public lands, and as the defendants have not proved a greater price per acre paid. Inasmuch as the defendants have not shown that Morris ever tendered or paid back any part of the sum of \$50, we infer that Stuart's interest in the land was such that it required that sum at \$1 25 per acre to purchase the same, which would prove Stuart's interest to be forty acres.

It seems Stuart claimed more than forty acres, viz. the tract described in the plats attached to the bill, but the survey made on exhibit was not approved by Morris. We have no data by which to ascertain the exact number of acres which Stuart claimed. Forty acres, however, are proved to be his right by fair legal presumption. It is urged in the defense that there is no evidence in support of the averments of the bill, that the premises surveyed were a part of Stuart's original claim, and that there is an impossibility of locating the land by the testimony and exhibits, and of giving it figure and form; that Morris did never, during his life, recognize any plat or survey as correct. The premises claimed in the bill, platted in exhibits No. 1, are the premises which are described in a certain deed by Stuart, tendered to Morris for execution, and attached to the first bill as exhibit No. 2, B. When this deed was tendered to Morris, he found no fault with the description of the premises, but claimed there was a mistake somewhere; and that there must be another trial. This declaration, on the inspection of the premises described, proves the location of Stuart's interest, but leaves the number of acres uncertain on account of the mistake alleged.

The fact that Stuart's family burying-ground is on these

Harding v. Fahey.

premises; that Morris did not repudiate the location, nor object to the survey, and did not tender back any part of the sum of \$50; and that the defendants have not, in their answers, denied the averment of the bill, descriptive of Stuart's interest, sufficiently identifying Stuart's lands with premises described in the bill, except as to the number of acres. The only difficulty remaining, is to adopt some rule by which fifty acres may be taken from the surveyed premises consistent with the evidence and the rules of equity.

The following rules have been established by some courts, which by analogy may enlighten us in the difficulties here presented:

1. That when a given number of acres are sold off of the west side of a quarter section of land, the premises shall be surveyed into an oblong square.
2. When a given number of acres are sold out of a corner of a quarter section of land, the premises shall be surveyed into a square.

In this case, therefore, we are of the opinion, that the complainants are entitled to forty acres of land, to be taken off of the westerly side of the south-west quarter of section twenty, in the township described in the bill, not crossing the lines of the survey in exhibit No. 1; and a decree will be entered in this court accordingly.

HARDING v. FAHEY.

In an action of trespass for killing a mare, the court should, on request, instruct the jury, "that the plaintiff could not recover, unless proved to their satisfaction that the defendant did kill the plaintiff's mare unlawfully."

Harding v. Fahey.

ERROR, to Lee District Court.

J. C. Hall, for the plaintiff in error, cited 2 Leigh's Nisi Prius, 1,404; 2 Cowen and Hill's Notes, 67, 896; *Dunlap v. Patterson*, 5 Cow. 243; *Clarke v. Dutcher*, 9 Cow. 674.

George C. Dixon, for the defendant. 1. The defendant was liable for shooting mare, even if such shooting was accidental. 1 Campbell's Nisi Prius, 497; 14 John. 432; 7 Blackf. 342; 11 Mass. 137; 2 Campbell's N. P. 464; 3 East. 398; 10 Bing. 112.

Opinion by HASTINGS, C. J. In an action of trespass the court was requested to instruct the jury, "that the plaintiff is not entitled to recover, unless it has been proved to their satisfaction that the defendant did kill the plaintiff's mare unlawfully," which the court refused to do, but charged the jury, that if the defendant killed the mare accidentally, he was liable, and that his liability did not depend upon the intention with which the act was done.

Taking the instruction refused in connection with the instruction given, the jury were advised by the court, that the defendant would be liable in trespass for any injury to the person or property of the plaintiff, committed through an unforeseen, unavoidable accident, exhibiting no want of care and caution. It cannot be imagined that for all injuries that may occur in the lawful exercise of a man's rights, he should be responsible in trespass.

The court below, we think, erred in not qualifying the instruction given, and in refusing to give substantially the instruction asked.

Judgment reversed.

Steamboat Kentucky v. Hine.

STEAMBOAT KENTUCKY v. D. AND A. HINE.

Owners of a steamboat, under the statute, may be sued by name of the boat, but they cannot institute a suit by such name, nor sue out a writ of error.

C. Walker and George C. Dixon, for steamboat, as plaintiff in error.

J. C. Hall and H. T. Reid, for the defendants.

Opinion by GREENE, J. This case was instituted in the district court of Lee county against the "Steamboat Kentucky" by name, and judgment rendered for the plaintiffs below. The proceedings were commenced under "an act to provide for the collection of demands against boats and vessels, approved December 20, 1838." This act authorizes any plaintiff to institute suit against any boat or vessel by name; but does not authorize any boat or vessel by such name to proceed as plaintiff, in any case, or sue out any process or writ. *Rev. Stat.* 101, § 2.

In this case the writ of error appears to have been sued out in the name of the steamboat Kentucky, without even showing by whose complaint, or upon whose responsibility it was issued. The 20th section of the act referred to, provides that, in all cases arising under the act, "if judgment shall have been rendered in favor of the plaintiff, the master, owner, agent, or consignee of the boat or vessel, or other person interested, may appeal from the judgment by giving bond and security in double the amount sued for; or sue out a writ of error, as if they or either of them had been sued."

This case, not appearing to have been brought to this court by any party authorized, under this section, to appeal or sue out a writ of error, we cannot entertain jurisdiction. The writ of error is therefore dismissed.

Penny v. Cameron.

PENNY v. CAMERON *et al.*

Where a party, having it in his power, cancels a contract or declares it void, he should restore the other party to his former right, by repayment of money or return of property received on such contract; and in failing to do so, he is liable to an action without a previous demand.

ERROR, to *Des Moines District Court.*

This was an action commenced before a justice of the peace to recover the value of a sleigh. Judgment having been rendered against the defendant, the case was taken to the district court by appeal. The questions raised in the court below sufficiently appear in the opinion of the court.

M. D. Browning, for the plaintiff in error.

David Rorer, for the defendant.

Opinion by HASTINGS, C. J. It appears from the bill of exceptions that Penny sold the defendant a sleigh, estimated at \$45; that Cameron agreed to deed to Penny in a day or two a lot in Burlington; and that Penny assumed the payment of a debt of Cameron's of fifty dollars due one Owen. That Owen, some time after, called upon Penny for payment, and Penny refused, for the reason that Cameron had not deeded the lot. Defendant took possession of the sleigh.

The court below instructed the jury that plaintiff could not recover the value of the sleigh without proving a demand on defendant, and decided that the whole contract was void.

It is not contended but that the contract was canceled and void; so that the court did not err in instructing the jury that the contract was void under the statute of frauds. Although the contract was *ipso facto* void, the plaintiff, Penny, has suffered an injury in the loss of a sleigh, accruing from the contract entered into by the parties, and the liabilities of the defendant would depend upon the question who was in the wrong.

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It was in Cameron's power to perform the contract on his part, and compel Penny to perform by deeding to him the lot and demanding the payment of the \$50 to Owen, or to force Penny into a mutual abandonment of the contract. Cameron should have tendered back the sleigh, or have made the deed, and demanded the payment of \$50. He could not keep the sleigh and refuse the deed. It was his duty, while it was in his power, to declare the whole contract void—to restore Penny to his original rights.

It seems to be well settled, that when it is in the power of either party to a contract to cancel the same or declare it void, if he do so, he should restore the other party to his former rights by repayment of money, if money had been paid, or by return of property, if property has been delivered. *Griffith v. Frederick Co. Bank*, 6 Gill and John. 424; *Connor v. Henderson*, 15 Mass. 319.

Cameron agreed to deed the lot in a day or two; he should have done so, or immediately have returned the sleigh in as good condition as he received it. The execution of the deed was an act precedent to the payment of the \$50 to Owen. So it appears from the statement of Penny to Owen. The original contract then being void, and first repudiated by Cameron's neglect to make the deed, or rendering any good reason therefor, and defendant having obtained possession of the sleigh, and neglecting to return the same, or refusing so to do; the law will raise an implied liability against the defendant to pay for the sleigh as much as it was worth, and the plaintiff can recover on the *quantum valebat* compensation accordingly.

A demand under such circumstances as the record presents was unnecessary, and therefore the court erred in the first instruction as given.

Judgment reversed.



Knetzer v. Bradstreet.

KNETZER v. BRADSTREET.

A note made in connection with a mortgage, need not, in a proceeding to foreclose, be made a part of the bill, if such note is produced in court subject to an order of cancellation.

A mortgage can be foreclosed, though a suit at law is pending on the note; but a payment of one will be in satisfaction of both.

IN EQUITY. Appeal from Des Moines District Court.

This was a bill in chancery to foreclose a mortgage. The defendant demurred on the ground, that the note given in connection with the mortgage was not made a part of, or given as an exhibit with the bill. Demurrer overruled, and a decree rendered for complainant.

David Rorer, for the appellant.

M. D. Browning, for the appellee.

Opinion by HASTINGS, C. J. It is not necessary in a bill in chancery to foreclose a mortgage to make the note, for the payment of which the mortgage was executed, a part of the bill. It is sufficient to produce the note at the hearing, ready to be canceled, if required, as was done in this case. If the note has been negotiated, it is a matter to be set up in the defence. Although the mortgage is an incident to the debt, it is an independent contract of a higher grade, and can be foreclosed although a suit is pending at law for a judgment on the note. The court will protect the party, however, from a second payment of the debt; and when the debt is paid, will see that satisfaction is entered of record of both causes of action, if necessary.

Decree affirmed.

 David v. Ransom.

DAVID v. RANSOM.

A wager, or bet, made between parties on the result of an election, is void; and a third party furnishing the means upon which such wager is made, upon condition that the losing party shall pay, cannot recover, unless the defendant made a new contract or promise to pay after the bet was determined.

In proving such new contract, it is sufficient for the plaintiff to show that, since the result of the wager had been ascertained, the defendant requested the plaintiff to deliver the property to another, and he had so delivered it, without express proof that defendant requested him to charge it, and promised payment.

Points in Opinion on Rehearing.

A joinder in short to an assignment of errors amounts to a plea of *nullo est erratum*, and is, in effect, an averment that the record generally is without error, and subjects the whole to the scrutiny of the court.

The supreme court will not be confined exclusively to an examination of the errors assigned.

ERROR, to Des Moines District Court.

M. D. Browning, for the plaintiff in error, cited 1 Scam. 579; Chitty on Con. 472, 550; Starkie's Ev. 72; 2 Peter, Dig. 424; 3 Term. 423; 2 U. S. Dig. 465, §§ 14, 17.

D. Rorer and *L. D. Stockton*, for the defendant, referred to *Rev. Stat.* 273; *Rust v. Gott*, 9 Cowen, 169; *Lansing v. Lansing*, 8 John. 454; *Bunn v. Riker*, 4 *ib.* 426; 12 *ib.* 1; 13 *ib.* 88; 5 Wend. 250; Cowper, 37, 729; 2 H. Black. 369; 3 B. & A. 179; 5 Eng. Com. Law, 255; Kinne's Law Comp. January, 1848, p. 25; 2 B. & P. 371; 7 Term. 680; 6 *ib.* 405.

Opinion by GREENE, J. David sued Ransom before a justice of the peace, for a cap, delivered to J. G. McDonald, on a bet. The case was appealed to the district court, where judgment was rendered for the defendant. The bet was made between Ransom and McDonald on the result of the vote,

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north of the Iowa river, for governor. The nature of the wager was made known to David, and a cap selected in his store, with the understanding that the loser was to pay for it, and that he was to hand it over to the winner when satisfied of the result. The cap was accordingly delivered to McDonald.

On the trial in the district court the following instructions were given to the jury, at the instance of the defendant's counsel.

1. That if they were satisfied from the proof that defendant and McDonald made a bet upon the result of the gubernatorial election, and that they bet the cap for which this suit was brought, and it was conditionally sold by plaintiff to defendant if he lost the bet, and to McDonald in case he lost, the said plaintiff knowing the terms of the bet, and the cap was delivered to McDonald, as winner, that the contract was void, and the plaintiff could not recover.

2. The court was requested by the plaintiff to instruct the jury, that although the contract might originally have been illegal and void, yet if, since the delivery of the cap to McDonald, the defendant had acknowledged that the delivery was right, and that defendant owed plaintiff for the cap, and would pay for it, he could recover. This the court refused, but charged the jury, that if, since the result of the bet had been ascertained, the defendant requested the plaintiff to deliver the cap, and it was delivered in pursuance of such request, and to have it charged to defendant, and he promised to pay for it, that then the plaintiff might recover, and not otherwise.

The first instruction may properly involve the inquiry, as to whether a wager of this kind is recoverable at law. The principle recognized at common law is, that when gaming, or a wager, has an immoral tendency, or is contrary to public policy, it is void. Strictly regarding these restraints, it might rationally be concluded that every kind of gambling and betting should be discountenanced by courts of justice; and that no contract made upon them, or growing out of them, should be recognized as legally binding. Still, certain

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wagers have received the sanction of judicial decisions, both in this country and in England. Courts have, however, repeatedly reprehended those decisions, and have expressed unqualified regrets that they had ever received legal sanction. But bets pertaining to, or in any way affecting the character, condition, or feelings of individuals, appear to have been very generally and justly discountenanced; and it is indeed remarkable, that the discrimination and beneficent policy of the common law has not uniformly extended the same judicious restraints upon every description of wager, however harmless in its apparent immediate effects. In its mildest and most innocent form, betting is a practice from which no possible good can result to the community. It can have no other than a demoralizing tendency, causing individual loss of time and money; often creating domestic distress, social discord, and not unfrequently leading to the most heinous offences.

But in a free country, where its very existence, and the majesty of its laws, depend upon an enlightened and unbiassed popular will, betting upon elections should especially be restrained. It is clearly repugnant to morality and sound policy, and inconsistent with the prevailing genius of our institutions. Its tendency is to exert an unwholesome and fraudulent influence upon the elective franchise. If the wager is made before an election, illegal votes are often secured, and others induced, contrary to the better judgment of the voter; or if made after an election, the parties interested might be led to exert a corrupt influence upon the canvassing, and returns of the votes. These pernicious influences upon the right of suffrage are great, in proportion to the amount of the wager, and the popularity of the parties concerned.

Where elections are so frequent, and so much depends upon their purity and orderly management, and upon a wise, judicious selection of officers, the importance must be apparent of having every voter left free in the exercise of a sound discretion—unbiassed by any undue influence, and untrammelled by sinister motives of private gain.

Contracts generally are regarded as void which have a

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tendency to mischievous consequences. This rule should necessarily embrace all wagers upon the event of elections. Besides the evil of interposing pecuniary barriers to the exercise of a free choice, they encourage intrigue, bargain, and corruption, and often tend to the disturbance of peace and good order. These wagers, being so injurious to public welfare, so pernicious to popular suffrage which is the very essence of freedom, sound policy and correct principles forbid that they should in any way receive the sanction of legal decisions, as they unfortunately have in some instances. But if a doubt can exist that such wagers, and the contracts growing out of them, are repugnant to the principles of common law, and void, we have a statute which conclusively determines the illegality. The first section of an act to prevent gaming, (*Rev. Stat.* 373) makes all promises, agreements, and contracts for money, or other valuable thing won, laid, or bet, at any game, or on any wager whatsoever, utterly void. This section is very comprehensive, and embraces every class of wagers. The bet between McDonald and Ransom being unlawful, and void, the question arises as to the validity of the arrangement made between them and David. It appears that he knew all about the wager, and participated in it, by furnishing the necessary means to carry it out. Any arrangement or contract made with him at the time of the wager, and identified with it, partakes of its nature, and is equally unlawful. In 8 Term, 425, the principle is laid down, that if it is clearly seen that the plaintiff is involved in the illegal transaction between the principal actors, he cannot recover. It is inconsistent with the spirit and intention of the statute to suppose that a person can participate in a wager, furnish the means by which it is made, and hold the stakes, and thus aid and encourage a transaction prohibited by law, and still escape its penalty and restraints. From his knowledge and concurrence in the arrangement we cannot otherwise regard the plaintiff than as a participator in the betting contract; his claim sprang out of it, and if allowed to recover it would be showing some sanction to the illegal transaction. The authori-

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ties cited by counsel for the plaintiff amply justify this position, and leave us no room to doubt the correctness of the instruction first mentioned.

The instruction requested by the plaintiff in relation to the acknowledgment of the defendant was properly refused, as it extended and applied only to the original, illegal contract. If the acknowledgment had been applied to an agreement to pay for the cap made subsequent to the determination of the bet, or to any subsequent authority from the defendant to the plaintiff directing the delivery of a cap to McDonald, it would be otherwise. *Clayton v. Delly*, 4 Taunton, 165.

In the substitution for the instructions refused, we think the court went too far. It required more proof of the plaintiff than was necessary to justify recovery on a new contract. It was sufficient for him to show, that since the result of the wager had been ascertained, the defendant had requested the plaintiff to deliver the cap to McDonald, and it was delivered in pursuance of such request. This, of itself, was sufficient to constitute a purchase, and create a liability, without requiring the plaintiff to prove that the defendant requested him to charge, and promised to pay for the cap. It was evidently no essential part of the contract for the defendant to desire the plaintiff to charge the item upon his books; nor was it necessary to prove an express promise to pay, for that was fully implied in the purchase, and direction to deliver.

As the bill of exceptions does not show that the necessary evidence to create a new and valid contract, under the proper instruction, was not adduced, and as the instruction required the proof of two unnecessary facts, the judgment is reversed.

Judgment reversed.

On a rehearing of the above cause, the following opinion was delivered by

GREENE, J. The errors assigned in this case we regard as sufficiently specific in their reference to the instructions set forth in the bill of exceptions. The joinder in short to the

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assignment amounts to pleading in *nullo est erratum*, which is, in effect, an averment that the record generally is without error. 2 Paine and Duer's Prac. 477. This necessarily brings the whole matter of record before the court. Whether the assignments are general or special, we are not confined exclusively to the consideration of the errors designated. The writ of error may be supported by any error appearing on the face of the record. 2 Paine and Duer's Prac. 478. Where the alleged errors are embodied in a bill of exceptions, a specific assignment of each is not necessary. 13 John. 475; 17 *ib.* 218.

When reviewing and correcting the proceedings of a court below, as contained in a bill of exceptions, it is the province of all courts for the correction of errors to act upon the whole bill without distinction, even though counsel do not specially refer, by assignment or argument, to the particular matter upon which the decision turns.

Our conclusion upon the points submitted on rehearing affords no reason to change the decision or opinion given in this case.

Judgment reversed.

BERNARD v. BARRY AND HURST.

Demand and notice on a foreign bill of exchange may be proved by notarial protest; but on an inland bill they may be proved by deposition, or oral testimony on trial.

A bill of exchange drawn in one state upon a person residing in another state, is treated as foreign bill.

Where a negotiable promissory note was made in Missouri, and indorsed in Maryland, the *lex loci contractus* will govern the liability of indorsers; and it will be presumed that the *lex mercatoria* prevails in those states, rendering indorsers liable on demand and notice, without suit against the makers. Such a note partakes of the nature of a bill of exchange; and there is no reason why the same rule should not apply as to the recep-

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tion of a notarial protest as evidence; still, an arbitrary difference is made, but it is admissible as a part of a notary's testimony in proving demand and notice.

Where several sue as indorsees on a bill or note indorsed in blank, they need not prove a partnership, nor an express transfer to themselves.

A finding by the jury as to one defendant on a note is a sufficient assessment of damages against his co-defendant.

ERROR, to Des Moines District Court.

This was a proceeding by assumpsit and attachment on a promissory note made in St. Louis, by J. and M. Smith, to the order of J. and O. Bernard, and by them indorsed to Barry and Hurst. The suit was commenced by Barry and Hurst, indorsees, against J. and O. Bernard, indorsers of said note. J. Bernard having withdrawn his plea in the case, judgment was rendered against him by *nil dicit*. The plea of general issue filed by O. Bernard was tried by a jury, who returned a verdict against him for the amount due on the note, and for that amount a judgment was rendered against both of the defendants, in favor of the plaintiffs. Upon the trial the plaintiffs did not prove the existence of the firm of Barry and Hurst, or that Samuel M. Barry and John Hurst were members of that firm; nor prove, otherwise than by the assignment, that the note was indorsed to them; but it was proved that the indorsement was made in blank by the defendants, and was subsequently filled up by plaintiff's attorney. The court charged the jury that further proof was not necessary, because the defendants had not in their pleadings denied the indorsement under oath. The notarial protest and deposition of the notary were admitted to prove demand and notice, and the firm of J. and O. Bernard.

D. Rorer, for plaintiffs in error.

Grimes and Starr, for the defendant.

Opinion by HASTINGS, C. J. If the instrument declared on is a foreign bill of exchange, there is no doubt the notarial

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protest should have been received as evidence of demand and notice without other proof; if an inland bill, the protest would not be necessary to entitle the plaintiff to recover. They could prove demand and notice by deposition, or oral testimony on trial.

This position seems to be uncontroverted, and originated for the convenience of commerce. A bill drawn in one state upon a person residing in another state is to be treated as a foreign bill of exchange. 2 Peters, 586. A negotiable promissory note, when put in circulation, partakes of the nature of a bill of exchange; and if the indorser reside in one state and the indorsee in another state, there appears to be no good reason why the same rule as to the reception of notarial protests as evidence should not be as applicable to the one as the other. But it seems there is an arbitrary difference. In *Nichols v. Webb*, 8 Wheat. 326, 331, the court say: "The notarial protest is not therefore evidence of itself in chief of the fact of demand, as it would be in case of foreign bills of exchange; and, in strictness of law, is not an official act."

The protest may be admitted, however, not as evidence of itself, but as a part of the testimony of the officer, and will be entitled to the same credit, and rank in the same grade of testimony, as any written memorandum of a witness taken on the occurrence of events, and forms a part of the *res gestæ*. It was error in the court to admit the protest in evidence as proof of demand and notice in any other manner than as a part of the testimony of the notary, as a paper writing used by him to refresh his memory.

But the error, if any, of the court below, in admitting the protest, cannot avail the plaintiffs here. 1. Because it appears to be in fact a part of the notary's deposition. 2. Because the record shows that demand and notice were proved.

A case ought not to be reversed for the admission of evidence of a secondary character, when the higher evidence is of the same facts at the same time submitted to the jury.

If the secondary evidence be objected to and admitted by the court, and the party at the same time introduce the pri-

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mary evidence of the same facts, the objecting party is not prejudiced, and the error is cured.

It is urged by counsel, that because this court have decided at the present term that demand and notice are not necessary in this state to hold an indorser liable on notes made and indorsed in this state, that demand and notice were not necessary in this case, and that the plaintiffs ought to have prosecuted the makers to insolvency before the defendants below would become liable.

For aught that appears of record, those events have happened as provided for in the statutes; on the happening of which an indorsee is entitled to his action against the indorsers. But this note was made in St. Louis, Mo., indorsed by the defendants below in Baltimore, Md. The *lex loci contractus* will govern and define the liabilities of the indorser. We will presume the *lex mercatoria* prevails in Maryland and Missouri unaffected by statutory regulations. The indorsers are therefore liable on demand and notice, without suit against the maker, as is required by our statute, provided the maker is solvent.

It is said the statute relative to promissory notes is but cumulative upon the mercantile law, and the indorser may be sued without first prosecuting the maker, he being solvent. The statute clearly, by any fair construction, renders the assignee of a note made and indorsed in this state liable only upon the happening of one of the following events :

1. If the maker have been sued, and in due time prosecuted to insolvency.
2. If the institution of a suit would have been unavailing.
3. If the maker abscond or leave the state when the note should become due.

It appears that the defendants below indorsed the note in blank; this, it is urged, is not a contract in writing. The law authorizes the holder of a promissory note to fill up a blank indorsement, and when so filled, it becomes a contract in writing duly signed by the indorsers, and they are answerable to the holders accordingly. The blank indorsement of the

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note in controversy was so filled by the plaintiffs below, and suit instituted. If the defendant believed that no such firm existed, or individuals composing the same, or that there was any other disability in the plaintiffs to the action, they should have pleaded in abatement. They have waived such objections by the general issue.

“When several plaintiffs sue, as indorsees, on a bill indorsed in blank, they are not bound to prove any partnership, nor any transfer expressly to themselves.” 2 Greenl. Ev. p. 391.

The finding of the jury on the issue joined by one of the defendants was a sufficient assessment of damages against the co-defendants in default by *nil dicit*, the cause of action being joined.

Judgment affirmed.

THE STATE v. MCCLINTOCK.

Where an indictment charges an assault to have been committed with several different weapons, it is not necessary to prove that the defendant used all the weapons described. The indictment will be sustained by proving that one of the instruments was used as alleged.

Where one of two co-defendants is acquitted, it does not necessarily follow that the other should be.

ERROR, to Henry District Court.

David Rorer and A. Lotspeich, for the state.

Hall and Mason, for defendant.

Opinion by HASTINGS, C. J. The defendant was indicted with one Alexander McClintock, sen., as follows: “And the jurors aforesaid do further present, that Alexander McClin-

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tock, sen., and Alexander McClintock, jun., on the first day of December, 1846, with force and arms, in the county of Henry aforesaid, then and there being unlawfully, did make an assault upon the person of one Abraham Harris with a pistol, and with a large wooden stick, and with a fence-rail, and with a wooden board, being deadly weapons and instruments, with an intent then and there to inflict upon the person of the said Abraham Harris, then and there being, a bodily injury without any considerable provocation."

The bill of exceptions represent, that while the defendant was on his separate trial, his co-defendant having been tried, the court ruled that the prosecution must prove that the defendant, Alexander McClintock, jun., did use all of the weapons and instruments mentioned in said count, upon the said Harris, at the time mentioned; and that it would be insufficient to sustain said indictment, if only one or two of said named instruments and weapons were proven to have been used by said defendant. It appears from the bill of exceptions that "it was proved upon said trial, by the prosecution, that Alexander McClintock, sen., used the fence-rail, the board, and stick, and that Alexander McClintock, jun., used the pistol." Which ruling of the court is assigned for error, and the trial of the defendant suspended for the decision of this court on the error assigned.

The defendant should have a fair trial on the merits, and, if guilty, be punished. The defendant's attorney contends, that the intent is the essence of the crime with which he is charged, and that the instrument is also an important property in the offense. The defendant seeks to escape, not for the reason that he did not use a deadly weapon, but because he did not use all the weapons. We think it is immaterial whether the defendant used one or all of the instruments described. If he made the assault with the intent, and with one of the instruments described, which is a deadly weapon, he is substantially guilty, as charged in the indictment. See cases cited by the attorney for the state. 1 Phil. Ev. 202, 203, 204; 1 Cowen and Hill's Notes, 495, 497; Russell on Crimes, 786.

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The defendant's attorney urges here, that one defendant only appearing to have been tried, we must presume his acquittal; and one being acquitted shall discharge the other. This would be a violent presumption. It has been thought charitable enough to presume a defendant innocent until he is proved guilty; but if the co-defendant has been acquitted, we do not think his acquittal will bar the present prosecution.

In this we are sustained by the authorities. See 2 Russell on Crimes, 791-2.

The decision of the court below will therefore be reversed.

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A final decree cannot be changed, altered, or reversed, except upon application by bill or petition for cause, to the court which rendered the same, or to an appellate court.

Cost on an attachment for contempt cannot be awarded in favor of the party against whom the writ issued.

IN EQUITY. *Appeal from the Des Moines District Court.*

Lucy Ann Deeds filed her petition in chancery against Silas Deeds, her husband, praying a divorce *a vinculo matrimonii*.

Petitioner sets forth that she had three children by her husband, to wit, Edward, a son, about nine years of age, Martha, about four, and Maria, about two years of age; that her husband repeatedly offered such indignities that her situation was intolerable.

Petition filed in the district court of Washington county, and demurred to, because no averment that petitioner was a resident of Washington county. Demurrer overruled.

Complainant then applied for alimony for the support of herself and children pending the suit, and for counsel fees to enable her to prosecute. And it was ordered by the court,

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that respondent pay to her, or to the clerk of Louisa county district court for her, the sum of fifty dollars counsel fee, and also two dollars per week for the support of herself and children.

At the same term, the *venue* was ordered to be changed to Louisa county; from whence, at the succeeding term, it was removed to Des Moines county, where, after hearing, a final decree of absolute divorce was granted. And it was ordered, that the two oldest children remain with the father, and the youngest female remain with the mother; and that Silas Deeds pay the mother, Lucy Ann Deeds, the sum of fifty dollars, annually, for the support of said child.

On the 2d of November, 1846, a writ of *habeas corpus* was issued on petition of Silas Deeds, directed to Lucy Ann Deeds and George W. Furman, to bring in the body of Martha Deeds; to which neither of them made return until brought into court on attachment, when Lucy Ann Deeds petitioned to have that part of the decree of June term, giving custody of Martha, to Silas Deeds, annulled, and to have the custody of the child given to her; which petition was granted, and the cause, shown by return of defendants to the writ of *habeas corpus*, was held good and sufficient, and the defendants discharged thereupon, and Silas Deeds adjudged to pay all costs.

Hall and Mason, for appellant.

D. Rorer, for appellee.

Opinion by HASTINGS, C. J. At the June term of the district court of Des Moines county, 1847, a decree of divorce was rendered on the application of respondent, against the relator. The decree was rendered on petition and answer; and among other things, it was ordered and decreed, that the two oldest children remain in the custody of the father. It is conceded that the child, whose custody is sought by the relator, by the writ of *habeas corpus*, is one of the oldest children, as specified in the decree.

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This part of the decree is not a mere temporary order, as counsel supposed who argued this case. The entire decree, except as to alimony and the custody of the youngest child, was a final decree; and that part of the decree awarding the custody of the two oldest children to the father is absolute, and cannot be changed, altered, or reversed by any court except an appellate court, or upon application by bill or petition to the court which rendered the same, impeaching it for fraud, or showing a mental, moral, or physical incapacity in the father to perform the duties of a guardian over his own offspring, happening since the decree.

In suing out his writ of *habeas corpus*, then, to obtain the custody of the child, the relator was pursuing the right guaranteed to him by a fixed and solemn decree of the court.

The record shows, that while the relator was before the court, on the 18th of October, 1847, prosecuting his writ of *habeas corpus*, a return having been made to the same, (the respondent and child being present in court,) was suddenly interrupted by a petition of the respondent, praying the court to alter and reverse that part of the decree awarding to the relator the custody of the child. That the court entertained the application, gave time to the relator to prepare a defense to the same, but immediately, or at least on the same day, granted the petitioner's prayer for rescinding, &c., and gave the custody of the child to the respondent, subject to future orders; and this we think was error.

The relator had never been served with process, ruled to plead, answer, or demur to this petition; nor had the same been set down for hearing, according to the generally recognized rules of chancery practice. From the fact that counsel have argued this case upon the basis that the decree in relation to the custody of the children was merely temporary, and subject to the future orders of the court, it is probable that the court below was led into the same error, as we will not presume that the court would alter a final decree, rendered at a previous term, in this summary manner, unless for mistake or fraud.

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The court awarded the temporary custody of the child to the mother upon inspection. What other evidence moved the court to make such order does not appear of record. But we have no doubt the court was actuated by the purest motives; that the ill health of the child, and its many wants and necessities, which none but a mother can administer to, imperatively demanded this temporary action of the court. But there can be as little doubt that the father was legally entitled to the custody of the child. And such are now his rights, and will be, so long as the decree of the court remains.

What the emergency was which demanded a temporary relaxation of this decree, does not appear of record.

It seems the writ of *habeas corpus* has lost its force and power, and it will be necessary for the relator to procure another writ. We cannot, therefore, give the relator relief under the present proceedings. We think it was also error to tax the costs of attachment for contempt to the relator.

The respondents were in contempt of the process of the court, or of the judge of that court, and it would be contrary to all practice and precedent to discharge a party in contempt from payment of cost.

It is not necessary here to examine and consider the right set up by the parties to the custody of the child, nor the various questions raised in relation to sufficiency of deposition and character of the same, and the condition of the parties and capacities of each to maintain and educate their offspring. We cannot do this without going behind the decree. That part of the proceedings of the court below, as follows, "And it is also further ordered and adjudged, and decreed, by the court here, that the decree giving the custody of the said Martha to the said Silas Deeds be rescinded and set aside, and that the custody of the said Martha Deeds be given to the said Lucy Ann Deeds, the mother of said child, exclusively, until the further order of this court," is reversed.

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STEAMBOAT KENTUCKY v. BROOKS *et al.*

A complaint against a boat, under the statute, should aver, in substance, that it was navigating the waters of the state at the time of the liability; but it is sufficient, after pleading over, if the complaint allege that the contract was made at a town within the state by the master or clerk of the boat.

By pleading, the defendant waives all objection to the overruling of his demurrer, especially where the defects are not substantial.

A boat is liable, under the statute, for the use of a barge.

A remedial statute should be so construed as to meet most effectually the beneficial end in view, and prevent a failure of the remedy intended.

ERROR, to Lee District Court.

Geo. C. Dixon and C. Walker, for the plaintiff in error.

H. T. Reid, for the defendant.

Opinion by GREENE, J. This suit was commenced in the district court, by the defendants in error, against the steamboat Kentucky, for the use of a barge. The proceedings were commenced under an act to provide for the collection of demands against boats and vessels. *Rev. Stat.* 101.

The first error assigned is, that the court overruled the demurrer to the complaint. The objection to the complaint is, that it contains no averment that the boat was navigating the waters of the state at the time of the liability. The act referred to, extending its provisions only to that class of boats, it is claimed very properly that the complaint should contain that averment. But it does allege that the contract for the use of the barge was made at Bloomington, in this state; and that the barge was lying at a wharf in the state at the time it was hired by the master and clerk of the steamboat. This, though informal, we think is sufficient in substance. It comes within that class of defects which cannot be taken advantage of after pleading over. The practice is well settled in this court, that the defendant waives all objection to the overruling

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of the demurrer by pleading over; especially when the defects to the pleadings demurred to are not substantially material. *Moore v. Ross*, Morris, 401.

The only other question involved in this case, arising from the instructions given and refused, is, whether the use of a barge, under circumstances to be determined by a jury, can be recognized as a supply for the use or material furnished for fitting out or equipping a boat within the meaning and legal construction of the statute. It is contended that the language contemplates such materials and supplies only as are embraced within and constitute a portion of the boat itself. The language of the act, though more directly embracing them, is not exclusively confined to such materials and supplies. We cannot believe that the mind of the legislature in enacting the law was not particularly directed to a recovery against the boats for all such "materials, supplies, fitting out, and equipping," as are necessary, and procured to enable them to carry out their appropriate operations. The evident object of the act was to extend protection and security to those of our citizens who deal with and give credit to the boats, and to secure for the boats the confidence of those with whom they deal. Very few of the boats navigating our rivers are built within the limits of the state, and very few of the materials for their construction are furnished by our citizens. But much is done by a large portion in furnishing steamboats with barges, lighters, labor, and other supplies and equipage to aid them in their voyages, and to enable them to carry out their appropriate business engagements in carrying freight and passengers. The necessity for such a remedy, in yielding protection to the people, and extending confidence in the boats, shows that the manifest intention of the legislature in making the statute was, to enable parties to hold the boats as liable for articles furnished, or services rendered, in their business of navigation and transportation, as in their construction and repairs. Any other construction, we think, would be inconsistent with the evident object and language of the statute, and work great

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injustice to parties who have relied upon this view of the law.

In navigating our rivers at a low stage of water, barges and lighters may become an essential part of the outfit and equipping of boats. Without them, they might not only be seriously retarded in the progress of their trips, but often rendered useless in transporting freights to their destined ports.

A remedial statute like this should be so construed as to meet most effectually the beneficial end in view, and to prevent a failure of the remedy intended.

From a careful examination of the instructions given and refused in the court below, we can see no error sufficiently material to justify a reversal.

Judgment affirmed.

CASES
IN
Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA;

OTTUMWA, JUNE TERM, A.D. 1848.

In the second year of the State.

PRESENT:

HON. S. CLINTON HASTINGS, CHIEF JUSTICE

" JOHN F. KINNEY, } JUDGES.
" GEORGE GREENE, }

FREDERICK v. GASTON.

Though an attorney, in his opening statement to the jury, claimed for his client a special property only in a chattel, evidence of general property is admissible. It is not the province of the court, under our statute, to instruct the jury upon questions of fact. The charge of a judge should be confined exclusively to the law of each case.

ERROR, to *Mahaska District Court.*

Wright and Knapp, for the plaintiff in error.

Th. H. Gray, for the defendant.

Opinion by KINNEY, J. This was an action of replevin, instituted and tried in Mahaska County. The action was brought by Frederick to secure the possession of a threshing

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machine, wagon, and harness. Under the instructions of the court, the jury found the threshing machine to be the property of the defendant, and the wagon and harness the property of the plaintiff, and assessed the damages of the defendant at \$407 00. A bill of exceptions was taken at the trial by the plaintiff, and it comes before this court upon writ of error, and the following, among other errors, are relied upon by the plaintiff.

1st. The court erred in holding the parties to the positions they had assumed before the jury in the opening argument.

2d. The court erred in directing the jury what they are to report in their verdict.

Although there are other errors assigned, arising out of the instructions given, and referred, many of which we think authorized, from the peculiar position this case assumed before the jury under the instruction of the court, yet as these are fatal to the defendant in error it will not be necessary to pass upon them.

It appears, from the bill of exceptions, that the plaintiff's counsel, in his opening statement to the jury, proposed to prove a special property in the machine, but introduced testimony tending to show a general property, which the court refused to permit the plaintiff to claim before the jury, and refused to submit to the jury the question of general property or ownership of the machine, wagon, or harness, but held the parties to the position which they had assumed before the court and jury in that respect, and charged the jury that they were the judges of the disputed facts only.

It appears from the exceptions, that the court confined the jury to the statement made by the plaintiff's counsel, and would not permit them to take into consideration testimony which was not relevant to the opening statement, and that the plaintiff was thereby excluded from proving a general property in the machine, &c. We think in this the court erred.

Admissions are of two kinds, conclusive and inexclusive, upon the party making them. Conclusive admissions are

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those arising from matter of estoppel, technically so called, as admissions by records and specialties, or where the parties agree to make the admission as evidence, or where the admission is made with a view to benefit the party making it, or to prejudice the party to whom made.

Inexclusive admissions are those where the party making them had no particular object or interest in view to mistake the truth, and where the admission does not fall within the above principle which makes it a conclusive one, Saund. Pl. and Ev. 37. According to this definition by Mr. Saunders, if the party making the admission had no interest in view to mistake the truth he could not be excluded by the admission. It frequently happens that an attorney in stating his case to the jury is not familiar with all the testimony to be introduced, and may very innocently fall into an error; and we think it would be adopting a practice which would operate very unjustly, for the courts to confine the testimony to the points or statements so made. Besides, it is not really within the power of counsel to know what the witnesses will testify to, and as it is quite important to inform the jury of the nature of the plaintiff's claim and what he expects to prove, the court, by excluding all testimony which did not tend directly to sustain the position thus assumed before the jury, would in very many instances preclude the party from obtaining that justice which the merits of his case would otherwise secure to him. But the admissions made on the trial of this cause were proper for the consideration of the jury, with all the other facts of the case, Saund. Pl. and Ev. 37; and consequently the court erred in limiting the jury exclusively to the admission or statement of counsel. See also upon admission of attorneys, 1 Saund. Pl. and Ev. 54.

But it appears that the court instructed the jury that the wagon and harness were the property of the plaintiff and must be so found by them, and put it to the jury to say whether the defendant was wrongfully detaining them from

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the plaintiff at the commencement of the suit; or in other words, which party had the right of possession.

It is very evident to us that the court instructed the jury upon questions of fact, which we think the court ought never to interfere with in jury trials. At common law, it is true, the facts and testimony were taken up in this order by the judge and placed in review before the jury, and this practice was frequently carried to so alarming an extent that the jury became but mere machines in the hands of the court to reflect back the verdict which the court would more than intimate by a particular reference to, and application of the facts. In many of the States of the Union, in New York in particular, it is the practice of the courts to charge the jury upon facts. But in this state, the legislature, to protect the people against any interference of the court upon matters of fact submitted to the jury, and to secure to parties a full and perfect trial, have passed a law by which the court are confined to instructing the jury upon questions of law. The statute provides that the District Court in charging the jury shall only instruct them as to the law of the case, *Rev. Stat.* p. 475. § 35.

The duty of the court we think is to instruct the jury upon the law, to inform them what the law is upon all questions arising out of the case, but we think it the peculiar province of the jury to make an application of the law to the facts and find their verdict. The only safe rule is to confine the courts to the law. If we depart from this, and they are permitted to charge upon facts, we think it would be an invasion upon the trial by jury, which is so much favored in this country; the tendency of which would be mischievous, unjust, and oppressive.

Judgment reversed.

Graves v. Cole.

GRAVES V. COLE.

An attachment should not be dismissed on the ground of a defective affidavit, if the defect is corrected by amendment.

Orders to dissolve an attachment, and also to amend the defect for which it is dissolved, are not consistent.

ERROR, to Wapello District Court.

THIS was an action of assumpsit commenced in the district court against Cole, upon which a writ of attachment was issued. Among other proceedings in the court below, a motion was made to dismiss the attachment, on the ground of alleged defects in the affidavit upon which the writ of attachment was issued. The motion was sustained by the court; and the plaintiff was authorized to amend his affidavit, which he accordingly did. But there was no revocation of the order dismissing the attachment.

Wright and Knapp, for the plaintiff in error.

J. C. Hall, for the defendant.

Opinion by HASTINGS, C. J. It appears from the record, that the defendant's motion to quash the writ of attachment, for reasons then stated, was sustained by the court, and at the same time leave given to the plaintiff to amend his affidavit. It appears the plaintiff did so amend, and no further objections were taken to the sufficiency of the affidavit, nor any further motion made to resist the attachment.

The error complained of is, that the court below sustained a motion to dissolve the attachment unconditionally. The statute permits a plaintiff to amend a defective bond or affidavit, in cases of attachment. The judgment of the court below dissolving the attachment, and giving leave to amend, is inconsistent; and the error is to be presumed to have been that of the clerk, in making the entries.

Although the writ of error runs to the judgment, yet it

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will reach the entire record, and inasmuch as the attachment and proceedings thereon appear to be regular, and no objections seem to have been urged against them after the amended affidavit was filed, the judgment of the court below, ordering a dissolution of the attachment, is reversed.

Judgment reversed.

Greene.
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Where F. had delivered to D. two flat-boats on a contract previously made, D. proved that they were not delivered at the time, and were not of the quality required by the contract, and that he had incurred expenses in making the necessary repairs upon them; and then proposed proving that he had sustained damage by loading the boats with produce, which was injured in consequence of their defective construction, and also that he had sustained damage by depreciation in produce, by not having the boats in time; it was held that the facts proposed to be proved, were too remote and contingent to become the subject of damages under the contract; held also, that as D. received the boats, he was bound to pay whatever they were worth, and that he could not set up subsequent losses, growing out of the use to which he applied them.

The act of accepting the boats without complaint, and appropriating them to use, furnishes strong presumption of a waiver of all objection to their defective construction and delay in delivery.

Though work is improperly performed, and not within the agreed time, still if it is of use and value to the employer, the workman may recover reasonable compensation, after making such allowance as the circumstances may require.

If in such case, the employer can protect himself from damage by reason of defective or dilatory work, he is bound to do so if practicable at a moderate expense, or by ordinary efforts; and he can then charge the delinquent party for such expense and efforts, and the damages which could not be avoided by such diligence.

Where F. conveyed a claim and improvements to D., for one hundred and fifty dollars on account, and also for a steam engine of particular specification, but which was not delivered by D. to F. at the time and place agreed upon; it was held that as D. failed to deliver the engine as agreed, F. was entitled to the amount at its estimated value, that it would have paid, had it been deliv-

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ered; but if no value was estimated upon it by the parties, that F. was entitled to the value of the claim over and above the \$150 applied on account. After a jury retire to consider their verdict, and come into court for further instruction at an unusual hour, it is irregular to give such instruction in the absence of a party or his counsel.

A verdict received, or a judgment rendered on Sunday, is void.

A judgment rendered after the last hour of the last day of a term as fixed by law, is *coram non judice*, and void.

A term of court, fixed in a county for one week, commencing on Monday, will expire on the following Saturday night at twelve o'clock.

ERROR, to Wapello District Court.

Wright, Knapp, and Cowles, for the plaintiff in error, cited the following authorities as to instructing the jury, rendering the verdict, and entering judgment on Sunday. *Swan v. Broome*, 3 Burr. 1595; *Beclor v. Aepo*, Sir Wm. Jones, 156; *McKalley's case*, 9 Coke, 66; *Pearce v. Atwood*, 13 Mass. 324; *Hoghtaling v. Osborn*, 15 Johns. 119; *Butler v. Kelsey*, 20 ib. 178; *Story v. Elliot*, 8 Cowen, 27; *Frost v. Hull*, 4 New H. 158; *Chapman v. State*, 5 Blackford, 111; *Arthur v. Mozly*, 2 Bibb, 589; *Shaw v. McComb*, 2 Bay, 232; *Nabors v. The State*, 6 Ala. 203; *Baxter v. State*, 3 Gilman.

J. C. Hall, and *H. D. Ives*, for the defendant.

Opinion by GREENE, J. Davis sued Fish in an action of assumpsit in the District Court, and obtained judgment.

On the trial, the plaintiff proved sales of goods to the defendant to a large amount, and the defendant then proved payments to a less amount. Among the items of payment were two flat-boats, delivered by the defendant to the plaintiff on contract. In order to rebut the proof of payment to the extent of these boats, the plaintiff proved that they were not delivered at the time required by the contract, were not of the stipulated quality, and that he incurred expenses in making the necessary repairs upon them. He then proposed proving that he loaded the two boats with produce for the New Orleans market, and in consequence of their defective con-

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struction the produce was damaged, and also that by not having the boats in time he suffered loss by depreciation in the price of produce in New Orleans. The defendant objecting to such evidence, the court ruled it out, and then charged the jury, that if they found the boats of less value for having been delivered after the time contracted, and for any defect in quality, or expense in repairing, they should deduct the amount from the contract price; that as the plaintiff received the boats, he was bound to pay whatever they were worth, and he could not set up subsequent losses, growing out of the uses to which he applied them. In this proceeding we think the court acted properly, or at least not adversely to the rights and interests of the plaintiff.

In regard to the greater price which might have been realized from the produce at New Orleans had the boats been delivered sooner, or as to the better condition of the produce had they been built better, we regard them as questions too remote, and as interests by far too contingent to be the subject of damages under the circumstances. If the boats were not made in the manner, nor delivered within the time required by the contract, the plaintiff was under no obligations to receive them; and he still would have had his remedy for damages against the defendant, commensurate with the injury sustained by his failure to comply with the agreement, but the act of accepting the boats without complaint and appropriating them to his own use, furnishes strong presumption, at least, of a waiver of all objections to their defective construction, and also to the delay in their delivery. Story on Bailment, § 441; *Everett v. Gray et al.*, 1 Mass. 101; *Jewell v. Schroepfel*, 4 Cowen, 564.

But the rule is settled beyond question, that if a job of work is of some use and value to the employer, or vendee, though improperly done, or not within the stipulated time, still the workman or vender is entitled to recover as much as the work is reasonably worth, making such reasonable allowance as the circumstances may require. *Linningdale v.*

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Livingston, 10 Johns. 36; *Jewell v. Schroepfel*, 4 Cowen, 564; *Harrington v. Stratton*, 22 Pick. 510.

In connection with this point it may be appropriately observed, that in case of a breach of such specific contract, if the injured party can protect himself from damage, he is bound to do so if practicable, at a moderate expense, or by ordinary efforts; and he can charge the delinquent party for such expense and efforts only, and for the damages which could not be prevented by the exercise of such diligence. *Locke v. Davis*, 17 Pick. 284; 2 Greenl. Ev. †261.

In the case at bar, much of the direct and immediate injury complained of might have been easily remedied or avoided by the plaintiff; and we think it must be conceded that the court ruled properly in excluding the evidence of remote and speculative damages; and rightly instructed the jury, that any expense in making the boats equal to contract stipulations might justly be reduced from the price. In thus assessing the damages, the worth of the boats at the time of their delivery and acceptance, might be very correctly determined.

2. It is also contended that the court erred in charging the jury relative to the value of a claim and improvements on the public lands, which the defendant had sold, and conveyed by quitclaim deed, to the plaintiff for one hundred and fifty dollars on account, and also for a steam engine of particular specification, and which was to have been delivered to the defendant, but was not, upon demand being made at the time and place agreed upon. Evidence was given tending to show the value of the claim and engine respectively, and also of the estimate placed upon them by the parties in making the contract.

The court instructed the jury that if the plaintiff failed to deliver the engine as agreed, they should allow the defendant the amount that it would have paid had it been delivered; and that if the parties in making the contract estimated the value, that should govern their assessment; but if no price was fixed upon it, they should allow the

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value of the claim over the \$150, paid on account. To this charge we are unable to see any legal objection or injustice in the method directed, for arriving at the balance due on the claim. We think the mere statement sufficiently develops the correctness of the charge without argument or reference to authorities.

3. The next error assigned involves the propriety of charging the jury in the absence of counsel engaged in the cause. It appears by the bill of exceptions that the case was submitted to the jury late on Saturday night, and early on Sunday morning they came into court, asked for and obtained further instructions in the absence of the plaintiff and his counsel. Aside from the impropriety of holding court, or in any way adjudicating a cause on the Sabbath day, we think the court acted incorrectly in giving instructions to the jury during the absence of plaintiff's counsel, even though they did not materially vary, in the estimation of the judge, from those previously given in presence of the parties. During the charge to a jury the presence and attention of counsel, or of the party conducting the trial, are at least as important as they are at any other proceeding in a cause. And when courts are in session upon business days and within usual hours it is customary and proper to extend some indulgence, and make some effort, by at least a call at the door, to secure the presence of a defaulting party or of an absent counsel. But when a court meets at a time so unusual and without notice to parties it is manifestly improper, and might work oppressively, to proceed in so important a matter as that of charging a jury without the knowledge or presence of a party or of his counsel.

4. The fourth error to be considered is, that the court received the verdict and rendered judgment on Sunday. The principle is well settled and recognized by all the courts that at common law no judicial acts can be done on Sunday; but other acts not pertaining to the administration of justice are lawful unless prohibited by statute. In this case the final charge to the jury, their verdict, and the judgment,

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were given and rendered upon the Sabbath day, and being in legal contemplation judicial acts, we can but consider them utterly void.

By all authorities Sunday is represented to be *dies non juridicus*. It was made so in the year 517, by a canon of the church, and adopted as the law of the land by the Saxon kings of England; and having been confirmed by William the Conqueror, and Henry II, was fully established as a part of the common law. Decisions in the English books are uniform in pronouncing all judicial proceedings performed on Sunday as unlawful and void, *Swann v. Broom*, 3 Burrow, 1595; and they appear to be sustained with almost equal unanimity by the American courts.

In *Story v. Elliot*, 8 Cowen, 27, it was decided that an award made on Sunday, and all judicial acts, are void: and so was held the act of serving a notice of a motion in *Field v. Park*, 20 John. 140.

In *Butler v. Kelsey*, 15 John. 177, the jury were empaneled on Saturday, and heard the allegations and evidence before 12 o'clock at night, still it was decided that they could not assess the damages nor deliver their verdict after that hour on Sunday. But it was decided in the case of *Hoghtaling v. Osborn*, 15 John. 119, to be proper to receive the verdict, presuming the jury were empaneled before Sunday commenced; but that it was illegal to enter the judgment on that day, and for that cause it was reversed. This decision appears to have been made without much deliberation or research. We think the reason of the common law and the current of authorities are strong against the legality of a verdict either made or received on Sunday. Such acts are clearly judicial, and should come under the prevailing and salutary rule that all judicial acts done on Sunday are void, unless expressly authorized by statute. The decision in the case of *Baxter v. The People*, 3 Gilman, 385, that a verdict of a jury may be entered of record on Sunday, but concluding it to be well settled that a judgment cannot be then entered, appears to have been made mostly

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upon the authority of the slightly considered case of *Hoghtaling v. Osborn*. Is there any foundation in reason for this distinction? If the action of the court upon the judgment is inadmissible and void, is it not equally so, under the reason and spirit of the rule, for the court to act upon the verdict? The noble and enlightened objects of the laws forbid such a distinction. A day so sacred, set apart for rest by the voice of wisdom, experience, and necessity; a day established by laws both human and divine, for public worship and private devotion, should be held in especial veneration by legal tribunals. Courts of justice should at least, by their practice and decisions, maintain the sanctity of that time-honored, and heaven-appointed institution. This is but imperfectly done under the distinction and license entertained by the last two cases cited. The case of *Baxter v. The People*, discriminates between ministerial and judicial acts of courts, claiming that the latter cannot be done on Sunday, but that the former may. But does not the same objection, the same illegality or nullity as to time, the same desecration of the Lord's day, result as much from the one act as from the other? Necessity has been urged as a justification for this distinction, but we think there is for it, in that, as little foundation as there is in reason.

In *Haynes v. Sledge*, 2 Port. Ala. 130, a writ, which appears by its test to have been issued on Sunday, was adjudged destitute of legal force; and it was decided in *Pierce v. Hill*, 9 Porter, 151, that a levy of an execution on Sunday is void.

An arrest, made pursuant to a warrant issued on the Lord's day was held illegal, and the officer making it, a trespasser, in *Pearce v. Atwood*, 13 Mass. 324.

Indeed, the benign intention of the law can only be maintained by applying it to proceedings generally of courts; to acts ministerial as well as to those strictly styled judicial; observing such exceptions only as the General Assembly in their wisdom may see fit to provide.

5. But there is another objection raised to the verdict and

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judgment in this case, which must render them as invalid in law as the error last considered. It is urged, and we must so decide, that the judge had no right to instruct the jury, receive their verdict, or enter judgment, after the last hour of the last day of the term of court, as fixed by statute. The term in Wapello county was limited to one week, commencing on Monday; and as it could not legally be held on Sunday, the term necessarily expired at the hour of twelve on Saturday night. All acts performed after the legal limitation of the term were *coram non judice* and void. *Nabors v. The State*, 6 Ala. 200; *Galusha v. Butterfield*, 2 Scam. 227; *Gregg v. Cook*, Peck, 82.

Judgment reversed.

BD. OF COM. OF WAPELLO CO. v. SINNAMAN.

The district court is not authorized to direct or command the board of county commissioners to make certain allowances found to be due a party suing the board, but should render judgment for the amount against the commissioners.

If a creditor is dissatisfied with the allowance made to him by the board of commissioners, he has his election to appeal to the district court, or institute an action at common law against the board. But if a party accepts what is allowed by the commissioners, he should be precluded from recovering anything further, either by appeal or suit at law.

ERROR, to Wapello District Court.

This suit was commenced before a justice of the peace, against the board of commissioners of the county of Wapello, and a judgment for the plaintiff was rendered. The commissioners took the case to the district court by appeal, where the cause was tried by a jury, who returned a verdict for Sinnaman of twenty-six dollars and

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seventy-five cents, and also found that before the commencement of the suit, he had presented his claim to the commissioners, who allowed him the sum of twenty-two dollars and fifty cents, but refused to allow the balance of his claim, amounting to four dollars and twenty-five cents, which with interest the jury found to be still due, and not allowed to the plaintiff below. And thereupon the following judgment was rendered in the district court: "It is considered by the court that the defendants ought to allow, and they are commanded to allow to the plaintiff the last mentioned sum, together with the costs of this suit to be taxed, in addition to the aforesaid sum by them formerly allowed on the same claim."

J. C. Hall and *H. B. Hendershot*, for the plaintiff in error, contended that the only method by which the district court can get jurisdiction over a claim against the county, is by appeal from the decision of the commissioners. The law creating the board of commissioners, fixes their duties and liabilities, and provides for the redress of all who may have dealings with them. The very organization of counties calls for this policy. The board have no money. They allow claims, and the treasurer pays upon their order. They can be guilty of no breach of contract only by refusing the allowance. They can do no act only when they are in session. 3 Blackf. 501; 2 Kent, 275; 16 Mass. 86; 8 Ohio, 314. Commissioners cannot appoint agents, 8 Ohio, 310; 4 Mass. 526; 12 ib. 189, 241; Angell & Ames on Cor. 210.

They cannot appoint an agent or make a contract by parol.

The judgment rendered is no judgment, but an arbitrary mandate of the court.

S. W. Summers, for the defendant.

Opinion by Hastings, C. J. The judgment rendered in this case is clearly irregular. The court should have rendered a judgment for the recovery of money against plain-

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tiff in error, or a judgment for the defendant. The judgment seems to be in the nature of a mandamus commanding the board of commissioners to make certain allowances to defendant in error, which we think the court was not authorized in this suit to do.

The statute makes the board of commissioners of a county a body corporate and politic, capable of suing and being sued, and provides that any person having a claim against the county may sue the board, but provides that the creditor shall first present his claim to the board for judgment, and if any such person shall feel aggrieved by the decision of the board, he shall have the right to appeal to the district court.

It is claimed by plaintiff's counsel that the only remedy for a creditor is, if dissatisfied with the decision of the board, by appeal to the district court. We think the common law remedy by action against the board is not abolished by these provisions in the statute: that a creditor has his election to appeal or to institute an action. If the plaintiff in this case presented his claim for allowance and it was in part allowed by the board, and he accepted the amount thus allowed, he should not be permitted to afterwards sue for the balance.

The acceptance of the part allowed should be considered satisfaction for the whole. If the party desired to bring suit, he should repudiate the allowance, refuse to accept the amount allowed, and bring his action or appeal to the district court.

It does not appear of record whether the plaintiff in error accepted the amount allowed. If he did, no judgment should be rendered for any part of his demand. If he did not, the court below should have rendered a judgment for the amount found to be due by the jury.

The act organizing a board of county commissioners in each county, and the 32d section of the Practice Act, providing for service of process on the board of county commissioners, show that it was not the intention of the legis-

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lature to deprive the creditors of a county of the common law remedy as against any other corporation.

The judgment, however, for reasons above first stated, must be reversed and cause remanded for the further action of the court below.

Judgment reversed.

CULBERTSON v. BD. OF COM. OF JEFFERSON CO.

By regulation of statute the sheriffs and clerks of the district courts are allowed not exceeding thirty dollars per annum from the county, for services in criminal cases when the party is acquitted; and are not entitled to any other compensation in such cases. Section 1, of the Laws of 1846, p. 1, does not extend to clerks—it applies to witnesses only.

ERROR, to Jefferson District Court.

C. Negus, for the plaintiff in error, cited *Rev. Stat.* p. 158, § 90; *ib.* p. 161, § 6; *ib.* p. 214, § 1; Laws of 1846, p. 1, §§ 1 and 2.

Geo. Acheson, for the defendant, contended that the sections of the statute referred to and in force only authorize the county to pay witness fees, in criminal cases when the accused is acquitted.

Opinion by KINNEY, J. This cause was tried in the district court of Jefferson County on an appeal from the decision of the board of commissioners refusing to allow the claim of the plaintiff in error as clerk of the district court for fees in criminal cases. The decision of the commissioners was affirmed by the district court, and a judgment rendered against the plaintiff for costs; to reverse which, this writ of error was sued out.

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If the plaintiff is entitled to recover, it is by virtue of the statute, and therefore we have only to refer to the various legislative enactments upon this subject to determine the liability of the county.

The first statute passed upon this subject was approved January 4th, 1839, and provides that when the prosecution fails, the costs, including the fees of the defendant's witnesses, shall be paid by the county, *Rev. Stat.* p. 158, § 90.

The next statute was approved February 15th, 1842, and provides that in criminal offences when the person is acquitted, no costs shall be rendered by the court against the county or territory, *Rev. Stat.* p. 161. These statutes are in direct conflict; the latter clearly repealing the former, and precluding the rendition of judgment against the county in case of acquittal. However benevolent this statute may have been in its operation upon the counties, it certainly was very oppressive upon those public officers who were required to render important service without the slightest equivalent.

This statute remained scarcely a year before the legislature passed an act to remedy the mischief, by providing that the county commissioners might allow the sheriff and clerk any sum not exceeding thirty dollars per annum for services in criminal cases where the party is acquitted, *Rev. Stat.* p. 214, § 1. By this statute provision is made for compensation to these officers in cases where there is no conviction. But in this act no provision is made for the payment of the fees of witnesses in criminal cases in which the result is the same, and the act of February 15th, 1842, exempting the counties from such fees, was still in force as affecting witnesses. Hence, as this was also a mischief which demanded a remedy, and as witnesses had a direct interest in the conviction of the accused, the legislature very properly passed an act, approved January 1st, 1846, requiring the county, in cases of acquittal, to pay the witnesses. This statute, however, only embraces *witnesses*, and does not extend to the officers of the court, as has been urged by the counsel for

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the plaintiff in error, a remedy having been extended to them by a previous statute.

The fees of the clerk of the district court being thus regulated by statute, and the statute having provided for an annual compensation to be defined by the commissioners in cases of acquittal, we know of no other way by which he can obtain his fees from the county in such cases but in the way and manner pointed out by the statute.

Judgment affirmed.

THE STATE v. SEAMONS.

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An indictment is good, though the year is expressed in it by numeral figures. Statutes of Great Britain not in force in Iowa.

If the nature of an assault, charged in an indictment, is set forth substantially in the language of the statute, it is sufficient.

Where the indictment alleged the assault to have been committed with a "deadly weapon" in the language of the statute, it was held to be a sufficient description of the instrument used.

It is sufficient, if an indictment states in substance all the facts which constitute the offence under the statute, sufficiently clear and specific, so that the accused cannot be mistaken in its nature, and would be enabled to plead an acquittal or conviction upon it in bar of another prosecution for the same offence.

ERROR, to *Wapello District Court*.

Henry B. Hendershot, prosecuting attorney, for the state.

1st. Figures at common law do not vitiate an indictment, and as we have no statute on the subject, of course the common law rule must govern, 1 Chit. Cr. L. 175 and note; *Rev. Stat.* p. 541, § 8.

2d. If the language of the statute is employed, the indictment is sufficient, 8 Mass. 64-8; 2 Scam. 338; 3 ib.

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474; 9 Ohio, 135; 11 ib. 70; *Rev. Stat.* p. 153, §46; ib. p. 169, §20; 3 Blkf. 308.

3d. If the offence is defined in such language as will enable the defendant to plead a former acquittal or conviction, it is sufficient, 2 Scam. 235; Morris, 233.

W. H. Brumfield and *Geo. May*, for the defendant. Words, not figures, must be used in stating time of commission of offence, 6 Blackf. 533. As to the necessity of describing the manner in which an assault is committed and the intention, see Breese, 199; *Curtis v. The People*, 1 Scam. 285-288, and authorities there cited; 1 Chit. Cr. L. 187, 188-190.

Opinion by GREENE, J. Indictment with intent to inflict a bodily injury. The first count, so far as applicable to the present inquiry, charges "that Albert H. Seamons, of, &c., on the seventh day of November, A. D., 1847, with force and arms, at, &c., did unlawfully, wilfully, and feloniously, make an assault upon Henderson Boggs with a deadly weapon, with an intent then and there to inflict upon, &c., a bodily injury, without any considerable provocation appearing, against the peace," &c. The second count contains all the material averments of the first, with the additional charge that the assault was made "with a large rock of the weight of two pounds, the same being a deadly instrument, with an intent," &c.; when the circumstances of the assault evinced "an abandoned and malignant heart," &c.

A demurrer having been filed, it was sustained by the court, and the indictment quashed.

The appeal is now made to us, was not this an erroneous decision?

There were three causes of demurrer urged,

1. The year when the offence is alleged to have been committed, is expressed in figures, and not in words. In a very few instances, courts have been so tenaciously formal, as to decide that words, not figures, must be used in designating

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numbers, or in alleging the date of the offence in an indictment. *Finch v. The State*, 6 Blackf. 533.

We think it must be difficult for the most acute discriminator, to reveal any good reason for a rule so stringent. With all the safeguards and formal precision which motives of mercy and justice to the accused have incorporated into the common law, numeral figures with the prefix A. D., have been recognized as a sufficient expression of the year in an indictment. *State v. Hodgeden*, 3 Verm. 481; 1 Chitty Cr. L. 175, and note. Though true by statute of George II., figures and abbreviations were superseded, and English words in detail required; but that statute not having been enacted in Iowa, is not in force. To remove the possibility of a doubt on this point, our legislature enacted that none of the statutes of Great Britain shall be considered as law in Iowa. R. S. p. 541, § 8.

As words are usually more reliable and certain than mere figures, it is no doubt a more reliable practice to represent amounts and dates by writing them out in full; especially when time or the amount constitutes an essential ingredient of the offence; but we are clearly of the opinion that if figures are used, they do not vitiate the indictment.

2. The nature or character of the assault is not sufficiently alleged. If this should be regarded as a proceeding at common law, and if we should upon that rest the sufficiency of the indictment, this objection would hold good, for there is a want of detail and certainty as to the facts and circumstances of the offence, which could not be overlooked in a common law indictment. But this is a statutory proceeding, in which the indictment follows with substantial accuracy, the language of the act upon which it is framed. When an indictment is thus drawn, employing the very words of the law which defines the offence, its sufficiency cannot well be questioned. The cases cited by the prosecuting attorney, and indeed the prevailing tone of all authorities upon this question, recognize the correctness of the rule.

3. The third objection urged to the indictment, is virtu-

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ally disposed of by the test which we have applied to the second. The want of a sufficient description of the instrument or weapon used or of the manner in which it was used, is obviated by the fact that the description is in the language of the law defining the crime. R. S. p. 169, § 20. No particular description of the instrument used in the assault, becomes necessary under this section of the statute. If designated as a "deadly weapon" or instrument, it is sufficient. But in the second count of the indictment in this case, a more particular description of the instrument used is given, though not in very accurate or technical language. A stone weighing two pounds cannot properly be styled a "*rock*;" but still the instrument is so described that it cannot well be mistaken, and even in greater detail than is required by the letter of the statute. The manner in which the stone was used is represented in the language of the act, and is therefore sufficiently described. In a word, the indictment states, at least in substance, all the facts which constitute the offence under the enactment referred to, and clearly discloses an indictable offence, sufficiently specific to advise the accused of its nature, and to enable him to plead a conviction or acquittal upon it, in bar of another prosecution for the same offence. This is all that should be required by any court.

Judgment reversed.

GEORGE, ADM. &C., &C. v. GILLESPIE.

It is a good defence to an action, if established, that the same subject matter in controversy had been once adjudicated.

Under the statute, failure of consideration or fraud can be set up as a defence to a promissory note.

The payee had his election either to sue on the note or on the original promise.

In an action on the note it is admissible to show by the transcript of the record and by parol evidence, that the matters in controversy had been de-

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terminated by a former suit on the original promise, and that the same defence of fraud and want of consideration was set up in both actions.

The defence of former recovery, or of former adjudication, may be urged under the general issue.

ERROR, to Jefferson District Court.

This suit was commenced before a judge of probate, on a promissory note made by John George, deceased, to the defendant in error. The probate court refused to allow the note, and an appeal was taken to the district court.

The defendant below, as administrator of the intestate, John George, contended that the plaintiff was estopped from putting the note in litigation because it had been once adjudicated between the plaintiff and the maker of the note, and offered in evidence as a bar to the action the records of the former suit, and also oral evidence of the identity of the parties, and to show that the instrument sued on was given for the same consideration money, on the same contract for a claim upon the public lands; that both suits were for the same object,—the former on an implied or parol promise, and the present suit on a written promise to pay the same liability—the consideration money for the claim. The record and parol evidence being objected to by the plaintiff, were ruled out and excluded from the jury, by the court.

The defendant then proposed offering the record as evidence of fraud, of drunkenness, and want of consideration in the transaction upon which the note was given, and to follow it up with oral evidence of those facts; and to show that they constituted the grounds of defence in the first trial in which the plaintiff failed to recover; but on objection the court decided the evidence inadmissible for those purposes. Other questions arose upon the trial, but as they are not involved in the decision of the case it is not necessary to state them. The plaintiff obtained a verdict and judgment for the amount due on the note.

J. C. Hall, for the plaintiff in error. The court below

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erred in refusing to let the record and parol evidence go to the jury as a bar to the plaintiff's action. The transcript shows a note for the sale of a claim, and in terms it corresponds with the character of the note in this suit. The date is the same, the amount is the same, the time of payment is the same. The defendant below then offered to prove by parol that the same defence was made then as at bar, that the plaintiff can sue for the original consideration; see *Cole v. Sackett*, 1 Hill, 516; 1 American Law Magazine, 119; *Muldon v. Whitlock*, 1 Cow. 452; *Frisbie v. Larned*, 21 Wend. 450. Then if he sued for the original consideration, and was defeated on the merits, the plaintiff can show that fact by parol, 1 Phil. on Ev. 334; 3 Cowen and Hill's Notes, pp. 842, 849, nn. 592, 594; *Gardner v. Bucklee*, 3 Cowen, 120; *Burt v. Sternburgh*, 4 ib. 559; *Brockway v. Kenney*, 2 John. 210; *Curtis v. Groat*, 6 ib. 168; *Felter v. Mulliner*, 2 ib. 181; *Young v. Overacker*, ib. 191; 1 Greenl. on Ev. 678-682.

These cases establish the position contended for by defendant below, that parol evidence is admissible to show what was decided by the verdict and judgment offered in evidence; also, that with such evidence it will be a bar to the plaintiff's action. This position cannot be shaken by the answer that the suit was not decided upon the merits—this we offered to establish; it should have been tried.

Wright and *Knapp*, for the defendant. The rejection of the transcript by the court below was entirely correct. It is a well-settled rule that a record of a former trial and adjudication of the subject, unless pleaded, cannot be given in evidence in bar of the action, *Kilheffer v. Herr*, 17 S. and R. 325; *Church v. Leavenworth*, 4 Day, 274.

The defendant claimed that the record should be admitted as conclusive evidence of the fraud and want of consideration mentioned in the plea and contained in the record. The court decided that it was not admissible for that purpose.

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And this is the second and last error assigned worthy of notice.

There is nothing in the record to show what influenced the mind of the jury; their verdict was for the defendant, but for what reason does not appear. It cannot then be evidence, at all tending to establish the fraud alleged. It is not evidence of any question that might or might not have been decided by the verdict of the jury—or might or might not have confirmed their verdict, 1 Phil. Ev. 333; *Commonwealth v. Mortimer*, 2 Virg. Cas. 325; *Benton v. Duffy*, Cam. and Norw. 98; *Stephens v. Dunbar*, 1 Blackf. 66; *Kendal v. Talbot*, 1 A. K. Marsh, 321. And not when the case might have been determined on some other ground—for misconceiving their action, *Arnold v. Arnold*, 17 Pick. 4; *Bates v. Thompson*, 17; ib 14; 1 Greenleaf Ev. 599; *Loomis v. Green*, 78 Greenl. 386.

In this case the plain and palpable reason why the verdict in the former suit was for defendant, as will appear obvious from the record, was, that there was an out-standing sealed note for the consideration money, for which suit was brought in the first instance. This, if shown, was a good bar to the action then pending, hence it is fairer to infer that this was the reason why the verdict was for defendant than that the fraud was proved.

Opinion by HASTINGS, C. J. It would have been a good defence against this action if the defendant below had proven to the jury that the same subject matter in controversy in this suit had been adjudicated in a former trial between the same parties before a court of competent jurisdiction.

The plaintiff in error offered to prove by a transcript of a record of a court having jurisdiction and by parol proof that the consideration of the note was the fraudulent sale of a certain claim on the public lands, and that the question of fraud in the sale had been passed upon by a jury, who found in favor of the plaintiff in error.

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Under our statutes the same defence can be set up to a promissory note as to any contract, written or parol, on account of fraud or failure of consideration, *Rev. Stat.* p. 453, §§ 5 and 6. The judge had his election to sue on the original promise or bring his action on the note. The plaintiff in error proposed to prove to the jury that an action had been instituted on the original promise, and that the validity of that promise and the consideration inducing it had been adjudicated in that action, and that the finding of the jury was conclusive evidence of the fraud charged in the defence.

The authorities cited by plaintiff's counsel clearly show that it was competent for the plaintiff in error to prove the truth of his defence by the record of a former trial, in showing by parol or otherwise that the matters in controversy were the same. It may be that the offer of the plaintiff to introduce such evidence in bar of the action was informal, but its influence on the jury, if true, must have been to prevent a finding for the plaintiff below, or have a tendency to produce that effect. The suggestion of defendant's counsel that the first trial may not have been on the defence set up to the second action does not answer the record here, which shows that the same defence was set up in both actions. If the verdict in the first trial was not on the merits of the defence, but on the fact that there was an out-standing note, it could have been easily shown. We think the plaintiff in error should have been permitted to go to the jury with his defence, and that the jury should have been instructed to find on the questions, suggested in the defence, on the transcript of the record, and the parol proof. The proof offered would have a tendency at least to prove the defence, and the court below erred in ruling out such testimony. It is no answer that the first trial might not have been on the merits.

The defence of former recovery or adjudication can be as well taken advantage of under the general issue as by a special plea in bar. This seems now to be the more liberal

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practice. The judgment of the court below will be reversed, and a *venire de novo* awarded.

Judgment reversed.

BRITTON v. WRIGHT.

In an action of tort, commenced in the district court, if the plaintiff recovers less than fifty dollars, he can recover no more costs than damages, and is liable for the balance of the costs accruing in the case.

ERROR, to *Van Buren District Court*.

C. Walker and *G. G. Wright*, for the plaintiff in error.

J. C. Hall, for the defendant.

Opinion by GREENE, J. This was an action of slander. A judgment was rendered against the defendant for twenty dollars damages, and costs to the same amount. In the taxation of costs, the defendant was charged with the amount which he had made in the case, in addition to the sum of twenty dollars on the plaintiff's costs. On a motion to re-tax, it was ordered that only twenty dollars of the costs made by either party be taxed to the defendants.

The errors assigned are upon the proceeding of the court below in the re-taxation of costs. It is claimed that the costs as re-taxed are not in accordance with the judgment, and that the defendant should pay his own costs in the case, in addition to the twenty dollars of plaintiff's costs. The judgment was rendered under the 33d Section of the Practice Act, *Rev. Stat.* 475, which provides, "that in all actions of tort, brought originally in any of the district courts, if the plaintiff recover less than fifty dollars, such plaintiff shall re-

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cover no more costs than damages." This evidently applies to the costs generally in a case, whether made by the plaintiff or defendant; and upon a judgment so rendered, the plaintiff can recover no more cost than damage. In legal contemplation, it can make no difference by which party the costs are made. Ordinarily, the successful party recovers his costs. This extends, indiscriminately, to all the costs pertaining to the case, whether made by himself or the opposing party. Under the above special provision of the statute, the plaintiff can only recover in proportion to the amount of damages, and is necessarily as liable for the balance of the costs in the case, as if the judgment had been for the defendant.

Judgment affirmed.

DAVIS v. DAVID.

The maker of a note acknowledges the name of the payee as set forth in the note, and in an action on the note, is estopped from setting up that such is not his proper name.

The omission to set out the proper name of a party, can only be taken advantage of by a plea in abatement, unless the defect appears of record.

ERROR, to Jefferson District Court.

This was an action of assumpsit commenced in the name of "A. J. Davis," as the payee of a note against the maker, and dismissed on motion in the court below, because the plaintiff was not described by any Christian name.

C. W. Slagle and *Geo. Acheson*, for the plaintiff in error. This cause was decided in the court below, on a motion filed by defendant in error to dismiss the suit, on the ground that

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the plaintiff is not in the writ or summons described by any Christian name. The suit, as appears from the record, was commenced on a promissory note which reads: "\$32.98. Due A. J. Davis or order, thirty-two dollars and ninety-eight cents, with interest at ten per cent., until paid, for value received this 15th of Sept. 1846.

(Signed)

CHARLES DAVID."

And the only questions raised in the court below on which this court is called upon to decide, are whether—

1. A plaintiff may make his legal demand for payment, under the very name by which the credit was given.

2. Whether a misnomer of plaintiff can be taken advantage of in any other way than by plea in abatement.

1st. We think the decision of the supreme court of the territory of Iowa, in the case of *Johnson v. Smith*, Morris, 105, equally applicable to individual persons or partnerships. The court there say, that though the courts were formerly fastidious in requiring the names of partners to be particularly set forth and proved, such a rule had been continually undergoing modifications, in order to encourage and facilitate the operations of trade; and they consequently there lay down the rule to "permit the plaintiff to make his legal demand for payment under the very name by which the credit was given." To the equity of this rule there can be no objection. A recovery under such name would certainly be an effectual bar to any subsequent suit. In the case before us, the credit was given in the very name in which suit is brought. The suit is brought upon a note signed by defendant, in which he himself has christened the plaintiff by the name used in his suit. Surely no surprise or injury can then come to defendant by being sued in this name.

2d. The objection in this case comes up on motion, "that the plaintiff is not described by any Christian name." This is not a plea in abatement. It does not give the plaintiff a better writ, neither is it sworn to. Our statute on abatements requires that such pleas, unless to the jurisdiction of

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the court, or where their truth appears of record, shall be verified by affidavit. "A misnomer of the plaintiff can only be pleaded in abatement, and was no ground for setting aside the proceedings, or for motion in arrest of judgment, or of nonsuit at the trial." 1 Chit. Pl. 281.

Charles Negus, for the defendant. The court was right in dismissing the suit, for the reason that the plaintiff did not sue by any given name, but by the initials of a name. *Rev. Stat.* p. 454, § 9, gives to companies the right to sue in a company name, but the statute does not reach this case; and by the common law the plaintiff must sue in his own proper name.

In suits brought before justices of the peace, the statute does not require any pleading, and it is only necessary to bring the defects there may be in the proceedings to the notice of the court, by motions or otherwise.

Opinion by HASTINGS, C. J. The court below sustained the defendant's motion to dismiss the suit, for the reason that plaintiff did not set out his full given name in the process.

The defendant acknowledged the name of the plaintiff to be as described in the process, by his signature to the note, and is thereby estopped from setting up that such is not his proper name and description.

An omission to set out the proper name of a party, can only be taken advantage of by plea in abatement, unless such omission appear of record.

The defendant's motion then ought not to have been sustained; and the judgment is reversed and cause remanded.

Judgment reversed.

Ober v. Shepherd.

OBER v. SHEPHERD.

In a proceeding on cognovit, or on a power of attorney, to confess judgment, in which the nature and amount of the plaintiff's claim are acknowledged, a declaration is not necessary.

ERROR, to Van Buren District Court.

Opinion by GREENE, J. Judgment was rendered in the court below, against Ober, by virtue of a power of attorney setting forth the nature and amount of the demand, and waiving process, error, and the right to appeal.

The defendant now seeks to reverse the judgment, on the ground that there was no action in form commenced against him, or declaration filed.

When judgments are thus rendered by confession, or on cognovit, in which the amount and nature of the plaintiff's claim are set forth, we can see no necessity for a formal action and declaration. Indeed, these are virtually waived by the power conferred upon the attorney to confess judgment, unless such preliminaries are required in the power of attorney, as conditions precedent to the confession.

It has, we believe, been the prevailing practice of our district courts, since their first organization in Iowa, not to require declarations in cases of judgment authorized in writing, by confession, and this practice we see no sufficient reason now to disturb.

Judgment affirmed.

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BOARD OF COM. OF JEFFERSON COUNTY v. WOLLARD.

The county treasurers not entitled to compensation from the county, for making out a list of school taxes with a statement of taxes paid and unpaid, as required by statute.

Jefferson County v. Wollard.

ERROR, to Jefferson District Court.

This suit was commenced before the board of commissioners of the county of Jefferson. Wollard filed his account for services rendered by him in making out a complete list of the lands and property on which the school taxes remained unpaid, on the first Monday of January, 1847, with a statement, showing the amounts of school taxes paid and those remaining unpaid, as required by third section of the school law, approved January 15, 1846; Laws of 1846, p. 9. The commissioners refusing to allow his account, he took an appeal to the district court, where, under the charge of the court, he obtained a verdict and judgment. Judge Olney charged the jury, "that as the act required the services to be performed, and made no provision for compensation, the plaintiff was entitled to recover, in this suit, a reasonable compensation for his labor, and further, that the compensation fixed by the fifth section of that act, (the school law above referred to,) and the fifty-first section of the 'act' to provide for assessing and collecting public revenue,' approved 15 January, 1844, does not cover the work and labor sued for in this action, nor is there any compensation therefor provided by statute."

Geo. Acheson, for the county. By the sixth section of the act requiring the performance of the services for which suit in this case was brought, the treasurer is allowed a *per cent.* for collecting and paying out school funds, which we hold was intended for full compensation for all duties required by said act.

By reference to section 48-51 inclusive, of the "act to provide for assessing and collecting public revenue," approved February 15th, 1844, it will be seen that the same services are required of the treasurer, in relation to the ordinary revenue, and no special compensation is fixed therefor. Section 51 of said act gives him a per cent., also the same fees as

(a) See Laws of 1844, p. 35

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are allowed to constables where taxes have to be collected by distress and sale of goods, and also fifty cents for each deed for land sold for taxes. Now, by reference again to the act first above referred to, the court will see that section sixth gives the treasurer his per cent., and section three makes it his duty to collect the school tax in the same manner that territorial and county taxes are collected, and gives him the same remedy to enforce collection. Hence we contend that the treasurer is allowed for all services required in relation to the school fund, 1st. His per centage; 2d. The same fees as constables on execution, when he has to proceed by distress and sale of goods; and 3d. Fifty cents for each deed for land sold for school tax; and that said treasurer cannot legally recover any further or extra compensation.

Charles Negus, for the defendant. Wollard claimed and recovered, in the court below, an account for services rendered in making a statement of the school fund. This act allows the treasurer one per cent. as a compensation for collecting and paying over this fund, but it makes no provisions for any other services.

The third section of said act provides that the treasurer shall proceed to collect said tax in the said manner, and use the same means as he does in collecting other taxes, but it does not make the provision for any pay, but is silent in this respect. The treasurer receives five per cent. for collecting other revenues, as well as fees for other services, but in collecting the school money the statute only gives one per cent. for collecting, and says nothing about other compensation. We cannot think that it was the intention of the legislature that the treasurer should make out this list for the commissioners, and do other services required by law for the one per cent., but that he should have a reasonable compensation.

Opinion by HASTINGS, C. J. It is admitted by the defendant in error, that he seeks recovery for services rendered, required by a statute, and for which the legislature have made no provision for compensation. And it appears that the court below

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charged the jury that Wollard, who it seems was the treasurer of the county of Jefferson, was entitled to recover, for services rendered, because the law required him to perform them. The law creating the officer of county treasurer, defines his duties and provides for compensation. The undertaking of the government is to provide the compensation specified as a reward for the faithful performance of the duties of the office. A man is not compelled to accept the office of treasurer, and if he do so, he will take it with all the honors, emoluments, and burthens pertaining to the same. There being no law making it the duty of the plaintiffs in error to provide compensation for the services specified, he has no legal demand against them. This question was settled in the case of *Whichen v. The Board of Commissioners of the county of Cedar*, tried at the January term of this court, 1848, in which it appeared the plaintiff in error was appointed by the district court, to defend a pauper indicted for a crime, the statute requiring the court to appoint an attorney to defend paupers in certain cases. In this case we decided that the plaintiff's remedy was by petition to the legislature for relief, there being no law making it the duty of the defendants to compensate him for such services.

The court below seem to consider this a case of employment and service, as between individuals, and raises an implied assumpsit. The case, we think, however, is very different. The government is not compelled to compensate its citizens for any services rendered; it is altogether a matter of discretion. The plaintiffs in error are officers whose duties are defined and liabilities fixed, and they ought not to be liable for compensation to other officers, whose duties are also clearly defined by the legislature, unless the legislature shall make it their duty to provide such compensation. The services rendered in this case were not rendered at the instance and request of the plaintiffs in error, nor were they rendered any more for the benefit of the plaintiffs than others. The services were rendered, not to facilitate the collection of an ordinary revenue for the state or county, but for a special

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fund to be created for the benefit of common schools, a fund highly favored and encouraged by the laws.

However worthy the defendant may be of the compensation which he seeks, it was not in the power of the court below, nor of this court, to make a law, making it the duty of the plaintiffs to allow the defendant's demand.

Judgment reversed.

GREENE, J., dissenting. I think the instructions of the court below in this case are correct, and that the judgment should be affirmed. The statute requires the treasurer to render valuable service to the county, but makes no provision for his remuneration. In requiring an officer to perform such labor, I think the law necessarily implies reasonable compensation. The county accepted and enjoyed the benefit of the work; it was essential to secure the collection of the unpaid school tax, and in setting forth the amount of the school funds. I cannot but regard it as manifestly unjust, and contrary to the honest intention of the law, to deny remuneration.

JONES v. TAYLOR.

Where T. agreed to buy a horse of J., and to pay him \$50 in specie for it on the following Monday, at which time the horse was to be delivered; and to secure the sale, deposited \$15 in bank bills with J., which he subsequently returned to T., with the understanding that if the purchase should not be completed within the stated time, J. should be at liberty to sell the horse to any other person; it was held that, as there was no written memorandum of the agreement, no earnest money paid nor delivery of the horse, J. could not recover the \$15 which he had returned to T.

1 ERROR, to Keokuk District Court.

Slagle and Acheson, for the plaintiff in error.

Gray and Hutchen, for the defendant.

Humphreys v. Daggs.

Opinion by GREENE, J. The jury in this case found a special verdict, by which it appears that the defendant agreed to buy a horse of the plaintiff, and pay him fifty dollars in specie for it on the following Monday, at which time the horse was to be delivered; and to secure the sale from any other person, deposited fifteen dollars in bank bills with the plaintiff, to be kept by him till the performance of the agreement. The fifteen dollars were subsequently returned to the defendant, to aid him in making up the fifty dollars in specie as purchase money for the horse, with the understanding that if the purchase should not be completed within the time agreed upon, the plaintiff should be at liberty to sell the horse to any other person; that there was no written memorandum of the agreement, no earnest money nor part consideration paid; that the plaintiff never delivered the horse to the defendant; and that in the failure to complete the purchase, "the plaintiff suffered no damage in fact."

The court decided that the facts found by the jury, are not sufficient in law to enable the plaintiff to recover the fifteen dollars which he refunded to the defendant, and that he take nothing by his suit. In this determination of the court, we can see no error. Under the finding of the jury, the arrangement between the parties was cancelled by their subsequent proceedings; and clearly comes within the statute of frauds, being without written memorandum or consideration, and was therefore void.

Judgment affirmed.

HUMPHREYS v. DAGGS.

The omission to aver damages at the conclusion of a declaration and of each count, is cured by verdict, when the declaration contains an allegation of indebtedness for a greater amount than that of the judgment.

Humphreys v. Daggs.

The Iowa statutes of jeofails, not obsolete, and extend explicitly even to material defects, after verdict.

ERROR, to Van Buren District Court.

Declaration in assumpsit containing three counts, neither of which contains the usual concluding averment of damages; nor is there such an averment at the end of the declaration. But one of the counts alleges an indebtedness of \$500. Humphreys, the defendant below, made default, and upon an assessment of damages by a jury, judgment was rendered against him for \$297.33.

A. Hall, for the plaintiff in error. There is no general clause at the end of the declaration claiming damages, and the plaintiff cannot recover any more damages than is claimed in the end of the declaration. See Chitty's Pl. pp. 339, 340, 418, 419; Stephens' Pl. 202; 1 Saunders' Pl. 418.

There are two special counts, and one for money had and received. The first special count is for fraud; the second for malfeasance as an attorney; the third for money had and received; and no damages claimed in either, or at the end of the declaration.

The record does not show whether the jury were sworn to assess damages upon all the counts or which count; but the record presumption is that the jury were sworn generally, which is bad where the declaration is absolutely defective. See 1 Chitty's Pl. note to p. 340, and 149.

"The statute of jeofails will not remedy the want of a material allegation."

The last count refers in its close to the last mentioned sum of money, to wit, the money demanded in said count, but does not demand any damages, nor in any way refer to the other counts, neither of which is good; and the assessment of damages is general upon all the counts.

Wright and Knapp, for the defendant. The only error we think worthy of note, is the one in regard to the omission to lay damages in the declaration.

Humphreys v. Daggs.

This, if error after verdict at all, is cured by our statute of amendments and jeofails. *Rev. Stat.* pp. 54, 55, 56, 57.

Opinion by HASTINGS, C. J. The error mainly relied on in this case is, that no damages are claimed in the declaration. The declaration seems to have been inartificially drawn, and bad on demurrer, but we think the defects are not of that character that they may be taken advantage of on error.

The summons claims damages to the amount of five hundred dollars.

One of the counts in the declaration sets out a cause of action with proper averments, setting up damages exceeding the damages assessed by the jury.

The verdict of the jury finds \$297.33 damages. The omission to claim damages in the conclusion of the several counts, is a mispleading, a default and negligence of the attorney who drew the declaration, which is cured by the verdict, and a writ of error will not lie to any such mistake after verdict.

See sections six and seven, statute of amendments and jeofails, (*Rev. Stat.* p. 54.)

The attorney for plaintiff in error argues that the defects are material, and are not cured by the statute. If *immaterial* errors only are cured by the statute, it would not have been necessary to enact such a statute.

The practice of the courts evading the statute of amendments and jeofails, renders it a dead letter, and ought to be condemned. Its language cannot be misunderstood, and it ought to be enforced.

The judgment of the court below is affirmed.

Judgment affirmed.

Yeager v. Circle.

YEAGER v. CIRCLE.

It will be presumed that costs were properly taxed in the court below until the contrary appears.

A question, of taxing costs, must first have been acted upon by the court below before it can be legitimately adjudicated by the supreme court.

The fee book, under the statute, may become a part of the record in a case; but unless the fee bill was made up under the direction of the court, it is merely a record of the clerk's proceedings.

ERROR, to *Van Buren District Court*.

James H. Cowles, for the plaintiff in error. The fee book is part of the record, and is certified to this court as such. Having control of the entire record, if there be error in any part of it, the court will correct it.

The judgment of the district court is for the principal and costs made up in the fee book. If the judgment for the principal be correct, let it stand. If the record shows an erroneous judgment for costs, it can and ought to be corrected. When a judgment is erroneous in part, and can be set right without a reversal of the whole, it should be reversed as to that part, and remain good for the rest. *Nelson v. Andrews*, 2 Mass. 164; *Glover v. Heath*, 3 ib. 252; *Johnson v. Harvey*, 4 ib. 485; *Waite v. Garland*, 7 ib. 453.

Wright and Knapp and A. Hall, for the defendant.

Opinion by GREENE, J. The only error relied upon in this case, is in the taxation of costs in the court below, for more than two witnesses, without the certificate of the judge that they were necessary. It does not appear affirmatively from the record that the necessary certificate was not made to the clerk to justify the taxation of costs, and we must necessarily presume that the officers performed their duty until the contrary is made to appear. It appears over the signature of the clerk that the costs were taxed by

Harrow v. The State.

order of the court. This leaves but little doubt that the necessary certificate or direction was given. But if the records even showed that the costs were improperly charged by the clerk of the district court, the motion for retaxing them must first be acted upon by that court, before the supreme court can properly entertain jurisdiction. To adjudicate upon the errors of a clerk's fee bill before the same has been submitted to the action of the court below, would be an exercise of original jurisdiction unauthorized by the constitution.

As is claimed by counsel for the plaintiff, the transcript of the fee book, under the 26th section of the Practice Act, *Rev. Stat.* 474, may properly become a part of the record in a case; but unless the fee bill is made up under the direction of the judge, it is not a record of the proceedings of the court, but merely of the action of the clerk after the adjudication of a case below is fully determined.

Judgment affirmed.

HARROW v. THE STATE.

In an indictment for obstructing a road leading from a point in Jefferson County to Lake Prairie in Mahaska County, the defendant offered to prove Lake Prairie to be in Marion County and not in Mahaska: Held not to be admissible; the discrepancy not being material, and could not impair the description or identity of the road.

An indictment and conviction are proper for obstructing a road established by re-location; even if it had not been opened and used as a highway.

A road is established when the survey and plat are placed upon record as required by statute.

· *ERROR, to Wapello District Court.*

S. W. Summers, for the plaintiff in error.

H. B. Hendershot, prosecuting attorney, for the state.

Harrow v. The State.

Opinion by GREENE, J. Indictment, for obstructing a road leading from a point in Jefferson county, to Lake Prairie in Mahaska county.

1. On the trial the defendant offered to prove that Lake Prairie, mentioned in the indictment, is not in Mahaska county, but in the county of Marion, which, on objection, was overruled by the court. And this is assigned as one of the reasons for reversing the judgment. But viewing the objection in any light assumed by counsel, we do not see in it anything of sufficient importance to justify a reversal. Even if Lake Prairie is in Marion county, that fact does not impair the description or identity of the road, and could not affect its establishment, nor abate the offence of obstructing it; and hence it was not material to be proved.

2. The next objection is, that the court refused to instruct the jury that the defendant could not be convicted on the indictment for obstructing that part of the road which was re-located. The fact that some of the road was established by re-location, or that the instruction complained of was confined to such re-located portion, could not change the defendant's liability. It became a public highway, whether established by the original location, or by a re-location.

3. The only remaining error urged is, that the court charged the jury, that if the defendant erected a fence across the road, as re-located, after the plat and description were recorded, they might find him guilty, though the road had not been opened, and was not *used* as a highway. In this instruction we see nothing erroneous under our statute. In a proceeding of this kind, the only questions to be determined are: 1. Was it a public highway as recognized by law? 2. Was it obstructed by the defendant? That the erection of a fence across a highway would amount to an obstruction, cannot be questioned; but would it amount to an obstruction if the road was not opened and used? It most certainly would, if the road had been previously located, surveyed, and a plat thereof placed of record. A public highway is not constituted by merely travelling over it for a few years. It

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must have been made by an authorized surveyor and viewers, and in the language of the statute, "when the surveyor and viewers make a report of the survey and plat of said road, it shall be recorded; then, from that time henceforth, the same territory shall be considered a public highway." *Rev. Stat.* p. 520, § 4. The road then dates its existence, not from the time it may have been opened or travelled upon, but from the day the survey and plat were placed upon record, as required by law. We learn from the bill of exceptions, that authentic evidence was adduced, showing that all these prerequisites had been complied with, and that the road had been regularly established.

Judgment affirmed.

BOWMAN v. WOODS.

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In an action for malpractice, as a physician, evidence to prove that defendant's treatment of the case was according to the botanic system of practice and medicine which he professed and was known to follow is admissible.

There is no particular system of medicine established or favored by the laws of Iowa; no system is prohibited.

The law implies an undertaking, on the part of every medical practitioner, that he will use an ordinary degree of care and skill in his practice, and will hold him liable for gross carelessness, or unskillfulness.

A physician is expected to practice according to his professed and avowed system.

Standard medical books are admissible as evidence of the author's opinions upon questions of medical skill and practice, involved in the trial of a cause.

ERROR, to Van Buren District Court.

Samuel W. Summers, for the plaintiff in error.

James Baker, for the defendant.

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Opinion by GREENE, J. The proceedings below were against Bowman for malpractice as a physician, in a case of accouchement. Verdict for the plaintiff, and his damages assessed at fifty dollars. The bill of exceptions gives the substance of a Dr. Coffin's testimony, who it appears was called in as consulting physician, about thirty-six hours after the delivery. At that time Dr. C. states that the after-birth was not removed, and the patient was greatly prostrated by the severity of the labor and the loss of blood; that she was also suffering from a distention of the bladder, which had not been evacuated since parturition. He gave it as his opinion that the *placenta*, and the distended state of the bladder, should have been removed at a much earlier period; and that such delay would be likely to produce puerperal fever. Several other physicians, as witnesses, concurred in Dr. Coffin's views of the practice.

The defendant then offered to prove that he was a botanic physician, and that according to the botanic system of practice and medicine, it is considered improper to remove the placenta, and that it should be permitted to remain till expelled by efforts of nature. But the proof of these facts being objected to, was ruled out by the court. In this we think there is error. As yet there is no particular system of medicine established or favored by the laws of Iowa. And as no system is upheld, none is prohibited.

The regular, the botanic, the homœopathic, the hydropathic, and other modes of treating diseases, are alike unprohibited; and each receives more or less favor and patronage from the people. Though the regular system has been advancing as a science for centuries, aided by research and experience, by wisdom and skill, still the law regards it with no partiality or distinguishing favor; nor is it recognized as the exclusive standard or test by which the other systems are to be adjudged. The evidence of the experienced practitioner of either system, is equally admissible in giving opinions upon questions of medical skill. But in the question before us, the objection does not appear to be to the qualification or skill

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of the witnesses, but rather to the facts which the defendant proposed proving by them. In those facts we can see nothing irrelevant or inadmissible; and as matter of defence to the jury, the defendant was entitled to the benefit of them.

A person professing to follow one system of medical treatment, cannot be expected by his employer to practise any other. While the regular physician is expected to follow the rules of the old school in the art of curing, the botanic physician must be equally expected to adhere to his adopted method. But on the part of every medical practitioner, the law implies an undertaking that he will use an ordinary degree of care and skill in medical operations, and he is unquestionably liable for gross carelessness or unskilfulness in the management of his patients; and still the person who employs a botanic practitioner, has no right to expect the same kind of treatment or the same kinds of medicine that a regular physician would administer. The law does not require a man to accomplish more than he undertakes, nor in a manner different from what he professes. Therefore, if in this case, the defendant below could show that he was employed as a botanic physician, and that he performed the accouchement with ordinary skill and care, in accordance with the system he professed to follow, we should regard it as a legal defence. It would show a full compliance with his profession and undertaking; and if injury resulted from it to the plaintiff, he could properly blame no one but himself. Story, in his work on Bailment, sec. 435, says: "But even where the particular business or employment requires skill, if the bailee is known not to possess it, or he does not exercise the particular art or employment to which it belongs, and he makes no pretension to skill in it.; then if the bailor with full notice trusts him with the undertaking, the bailee is bound only for a reasonable exercise of the skill which he professes, or of the judgment which he can employ; and if any loss ensue from his want of due skill, he is not chargeable. Thus, (to put a case borrowed from the Mahomedan law,) if a person will knowingly employ a common mat ma-

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ker to weave or embroider a fine carpet, he may impute the bad workmanship to his own folly. So, if a man who has a disorder in his eyes should employ a farrier to cure the disease, and he should lose his sight by the remedies prescribed in such cases for horses, he certainly would have no legal cause of complaint." Judge Story then goes on to state that in all such cases, the employer ought properly to attribute the loss or injury to his own negligence and mismanagement. The case of the *Commonwealth v. Thompson*, 6 Mass. 134, exhibits a revolting instance of malpractice, in which *lobelia* was administered to such indiscriminate excess as to occasion death. Still it was held that if a medical pretender administers medicine to his patient with an honest intention and expectation of a cure, but which causes death, the party prescribing cannot be adjudged guilty; and that there is no law which prohibits any man from prescribing for a sick person with his consent, if he honestly intends to cure him by his prescription.

The people are free to select from the various classes of medical men, who are accountable to their employers for all injuries resulting from a want of ordinary diligence and skill in their respective systems of treating diseases. It is to be lamented, that so many of our citizens are disposed to trust health and life to novices and empirics, to new nostrums and new methods of treatment. But these are evils which courts of justice possess no adequate power to remedy. Enlightened public opinion, and judicious legislation, may do much to discountenance quackery, and advance medical science.

The only other error assigned in this case, which we deem it necessary to notice, is in relation to the admissibility of medical books as evidence. It appears that the defendant offered to introduce certain medical books, which witnesses had declared as standard works on botanic medicine, and from which they claimed to have derived much of their professional knowledge, but, on objection, the court excluded them. The authorities upon this point are not uniform; but the district judge decided in conformity to the prevailing de-

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isions of at least the English courts. In the case of *Collier v. Simpson*, 5 Car. and Payne's N. P. R. 73, it was decided that medical books are not admissible in evidence, though professional witnesses may be asked the grounds of their judgment and opinion, which might in some degree be founded on these books, as a part of their general knowledge.

Judge Abbot, on the trial of Donal for poisoning, refused an appeal to the works of Thénard, and said, "We cannot take the fact from any publication; we cannot take the fact as related by any stranger." But in the trial of Spencer Cooper, the court permitted medical authorities to be read. (Gay's Forensic Medicine, 11.) And Dr. Beck, in his excellent work on Medical Jurisprudence, 2 vol., 666, states that in this country an objection has never been made to the introduction of authority, or the observation of others, as testimony by medical men. In this, we think the author mistaken, for an appeal to medical authorities has been disallowed by some of the courts in this country; though physicians, when testifying, are permitted to refer to medical authors, and to quote their opinions from memory. Being permitted to refer to and quote authors, we can see no good reason why they may not read the views and opinions of distinguished authors. The opinions of an author, as contained in his works, we regard as better evidence than the mere statement of those opinions by a witness, who testifies as to his recollection of them from former reading. Is not the latter *secondary* to the former? On the whole, we think it the safest rule to admit standard medical books as evidence of the author's opinions upon questions of medical skill or practice, involved in a trial. This rule appears to us the most accordant with well-established principles of evidence.

Judgment reversed.

CASES
IN
Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA;

IOWA CITY, JUNE TERM, A.D. 1848,

In the second year of the State.

PRESENT:

HON. S. CLINTON HASTINGS, CHIEF JUSTICE.

" JOHN F. KINNEY, } JUDGES.
" GEORGE GREENE, }

MUSGRAVE *et al.* v. Bd. of Com. of Muscatine Co.¹

A plea averring complete performance of all the conditions of the bond sued upon, is not demurrable.

ERROR, to Muscatine District Court.

Jacob Butler, for the plaintiff in error.

W. G. Woodward, for the defendant.

Opinion by KINNEY, J. This was an action of debt, instituted in the district court of Muscatine county, upon a county treasurer's bond against the plaintiff in error and his

¹ Judge Hastings having been of counsel, took no part in the decision of this case.

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securities. The defendants below pleaded *non est factum*, and Musgrave, the treasurer, filed several special pleas, one of which was a plea of performance. These pleas were all demurred to, and the court sustained the demurrer; which is the error complained of by the plaintiff in error. From a careful examination of the third plea, we believe it to have been a good one. It avers a full and complete performance of all the conditions of the bond, according to the tenor and effect thereof, which, if true, we think would have constituted a good defence to the action. We think the court erred in sustaining the demurrer to this plea.

Judgment reversed.

 COOK *et al.* v. STEUBEN Co. BANK.

A motion in a case is no part of the record, unless made so by bill of exceptions.

When the district court rejects a plea in abatement, and the defendants take no exception to the ruling of the court, but file a different plea, and upon it apparently rest their defence; it will be presumed that the plea in abatement was waived, or the objection to the ruling of the court abandoned.

A plea of *nul tiel* corporation, should be in substance a plea in abatement, as it attacks the disability or non-existence of the plaintiff.

A judgment rendered for a party in another state, is conclusive as to the existence of such party at the rendition of the judgment.

ERROR, to Scott District Court.

This was an action of debt against Eb. and Wm. L. Cook, on a judgment record from the supreme court of the state of New York.

The proceedings below were at the September term, 1844, and are sufficiently disclosed by the arguments of counsel and the opinion of the court.

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G. C. R. Mitchell, for the plaintiffs in error, submitted the following arguments in writing, filed January, 1846. This was an action of debt, on the transcript of a judgment of a court in the state of New York, by the bank against plaintiffs in error. A *capias ad respondendum* was issued by the clerk of the district court of Scott county, Iowa, on an affidavit made by the cashier of the bank before a certain Wm. Hamilton, who states that he is clerk of the circuit court of 6th circuit, &c. Plaintiffs in error were arrested, and gave bail to the sheriff. At the return of the writ they moved the court to vacate the bail bond, for reasons which appear in the record, to wit, insufficiency of affidavit. The overruling this motion, and striking plea in abatement from the file by the district court, are the first two errors assigned. Defendants object to this court noticing these assignments, on the ground that neither the affidavit, *capias*, motion to vacate, or orders of court overruling the motion and striking plea from files, is a part of the record; and this court cannot notice or regard them, although they are all copied into the transcripts as a part of the record by the clerk. 1 Blackford, 86, is referred to. In that case the first error assigned is overruling a motion to dismiss the writ. The court say they cannot notice it, because the writ is no part of the record, but no authorities are referred to. The same book, pages 347 and 429, is also referred to. On p. 347, the court decide that a plea rejected on motion, is no part of record, unless made so by bill of exceptions; and on p. 429, that a judgment overruling motion to quash writ, or rejecting a plea in abatement, is no part of record. For this strange doctrine, not a single authority is referred to by the court. See 7 Wheaton, 530. That the writ in England is not technically a part of the record, is admitted. There it is considered of so little consequence, that it is not even necessary that an original should be returned, if the defendant enters his appearance; and it is undeniable that the court of king's bench obtained its entire civil jurisdiction by a fiction, defendant being first arrested upon a writ implying a tres-

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pass, and the plaintiff then declaring in debt or assumpsit, &c., and no advantage could be taken of the variance between the writ and narration. But in the United States a plea in abatement lies to such variance. See Story's Pleadings, for precedents as to such pleas. No such precedent, however, is to be found in an English book. For plaintiff, it is insisted that, however it may be considered in England, in this country the affidavit to hold to bail, and the writ, are both parts of the record, and that this court is bound to notice them, and if upon such examination any error is shown to have been committed in the court below, to reverse. In support of this position, and as to the plea in abatement, see 1 Stewart, 70; in that case one of defendant's pleas was stricken out as frivolous, without any bill of exceptions: this was assigned for error. The supreme court examined the plea, and reversed the judgment below.

Same book, 149, the error assigned was that no writ or notice was served on defendant below. The court say the transcript shows an affidavit to hold to bail, and a bail bond given by defendant below, and therefore they arrive at the conclusion that a writ was issued and served, and affirmed the judgment below. See same book, 171.

That the *capias* is part of the record, see *Barton v. Petit*, 7 Cranch, 200. The clerk, in the transcript sent up, not having inserted the *capias ad respondendum*, defendant in error suggested the omission of the writ as diminution. The court awarded a certiorari; as a return to which, the clerk sent up a copy of the writ, and the marshal's return, and the supreme court of the United States examined them, which shows conclusively that the court considered them part of the record, and that they were bound to notice them, although it was stated by counsel, that in the Virginia practice, the writ was not considered part of the record.

If not technically part of the record, it is a part of the proceedings in the cause, and the appellate court is bound to notice it. As to the plea in abatement, there can be no question that it is properly a part of the record. If the pleadings

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in a case do not constitute a part of the record, I know not of what a record can be composed. In *Hays v. McKee*, 2 Blackf. 11, the court say neither the writ nor return are part of the record; in note 2, page 12, reference is made to 4 Rand, 413, where the court decide, "In cases of judgments by default for want of appearance, the writ with the endorsement is a necessary part of the record." Then the writ and endorsement are part of the record of a suit, until the defendant enters his appearance, but instantly on his appearance, (according to the Indiana decisions,) by some magic their existence, as part of the record, is annihilated. This is a logic that I confess I cannot understand, and I think this court will hesitate long before it adopts it, in opposition to the practice of the supreme court of the United States. That the affidavit to hold to bail is as much a part of the record as the writ, cannot, I think, be successfully controverted. It is the foundation of the whole proceedings, that which alone authorizes the *capias*, and is a component part of the process to bring a party into court. See *Lewis v. Brackenridge*, 1 Blackf. 115, where the court say, "The affidavit to hold to bail is a component part of the process, &c.," and in 7 Durnfd. and East. 372, the court say, "but the affidavit to hold to bail is only process to bring the party in." The above authorities I think abundantly show, that not only American authority and practice, but justice and sound common sense, unite in support of the position, that the affidavit, writ, and return, and plea in abatement, are parts of the record and *proceedings* in the case, at least so far that this court can and is bound to notice them, and that our errors are well assigned. But defendant says our objection came too late, that after appearance it is too late to object to irregularity in process. This court has, during the present term, decided that appearance does *not* cure defects or irregularity in the process, and for further authority on this point, see 5 Durnfd. and East. 254; 7 ib. 372.

The bail bond in this case ought to be vacated, because there is no sufficient affidavit. The affidavit was made in

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New York before a clerk. This court cannot officially know that he was clerk. If it was a judicial proceeding, which I contend it was, it has not been certified and authenticated in the manner prescribed by Congress. If it was not a judicial proceeding, where does the clerk derive his authority to administer the oath? Not from any statute of Iowa! The district court could not know that he was authorized, even by the laws of New York, to administer oaths, and the supplementary affidavits and depositions which defendant in error has taken since and procured to be brought here by certiorari, cannot mend the defect. In the first place, they are clearly no part of the record, and in the second, supplementary affidavits are never received to supply defects in the affidavit to hold to bail, 20 John. 337. The affidavit, at the time it is filed, must be perfect and sufficient. 1 Blackf. 115. The court say, "No supplementary or counter affidavits are admissible, nor any other evidence as to the merits than that produced to the clerk." The naked point for the court to decide, is therefore; is an affidavit made in New York, before and authenticated by the clerk of a circuit court there, alone sufficient to authorize holding to bail in Iowa?

In addition to the reasons above assigned, I would say, that our statute is peculiar, it requires more to be sworn to, to hold to bail, than is required in England; there, affiant only swears to the debt,—here, he must not only swear that there is a debt due, and as near as he can the amount, but he must also swear that he verily believes defendant is about to do certain acts, specified in our statute, to his prejudice. To hold to bail here, it was not sufficient that a debt was due. Now, if an affidavit like the one in this case should be held sufficient, what security have our citizens against perjury? Although there may not be one syllable of truth in the affidavit made abroad, the affiant cannot be convicted of perjury. Surely it never could have been the intention of our legislature to subject our citizens to this hazard. It must have intended that the affidavit should be made before some person authorized by itself to administer oaths. The authorities

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referred to by defendant, as to receiving affidavits made abroad to hold to bail, do not apply to this case, because in the cases referred to, affiant was only required to swear to the debt, which a stranger, one thousand miles distant, could as well swear to as a man on the spot where the process issued; but the affiant, by our statute, had to swear to facts which a stranger could not be supposed to know. The affidavit in this case, I insist, does not cover all the requisites of our statutes. There were two in force at the time the writ issued in this case. One (*Rev. Stat.* p. 92, § 1,) requires affidavit to state, 1st. indebtedness, and also one of two other facts. The other (*Rev. Stat.* p. 235, § 1,) requires a statement of other facts. These two statutes, I insist, were cumulative, and the affidavit in this case only contains the affirmation of indebtedness required by the first statute, and the statement required by the second; and I insist that it should also have contained either the second or third requisite prescribed in the 1st section of the first act. The provisions of the two acts are not conflicting, and as the last does not repeal the first, both are in force.

The court below erred in striking out the plea in abatement. I insist that under our statute the plea is good. The proceedings under our statutes in relation to bail were as much a departure from the course of the common law as are the proceedings in attachments. The affidavit to hold to bail contains almost the very same allegations as that for the attachment, and the conditions of the bail bond and the bond for replevying property attached, are substantially the same. I can see no good reason, therefore, why a plea in abatement can be pleaded, as is the constant practice to the affidavit for an attachment, and not to the affidavit to hold to bail. The reasons for allowing the plea in the attachment case are, 1st, that the proceeding is a creature of statute, and that the facts sworn to must exist, not that they are sworn to, to warrant the issuance of the attachment. Now our proceeding to hold to bail is as much a creature of statute as the attachment. And it is just as requisite by

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the statute that the facts should exist that are sworn to, to authorize the *capias* as the attachment. The plea, therefore, I conclude, ought not to have been stricken out; it was a good plea.

Another error assigned is the sustaining the demurrer to the plea of *nul tiel corporation*. The ground upon which the court below proceeded in sustaining the demurrer was, that upon the trial on the merits the bank would be bound to prove its corporate existence and capacity to sue, and that the plea of *nul tiel corporation*, therefore, amounted to the general issue; and several New York cases were referred to as authorities. I think there will be no difficulty in satisfying this court that the district court erred in following those authorities and applying them to this case.

On the part of plaintiff in error, it is insisted that the correct doctrine is, that where a corporation sues and defendant wishes to contest the existence of the corporation or its capacity to sue, he must plead specially in abatement or bar, Sec. 1st, Saunders's R. 340, note 2; in which, after stating several cases, it is laid down that "the defendant can only plead *nul tiel corporation* in bar to an action by a corporation." See also *Proprietor's Kennebec Purchase v. Call*, 1 Mass. 482-484; *Couard v. Atlantic Insur. Co.* 1 Peters, 386-450; 18 John, 137, where the court say *nul tiel corporation* is a good plea in bar. See 5 Ohio, 286: the court say, "If the defendant intended to object to the want of capacity in plaintiff to sue, he should have pleaded that matter specially in abatement or bar. He has pleaded the general issue. This admits the capacity of plaintiffs to sue in the corporate character they have described for themselves." This is a case directly in point. If defendant below had pleaded the general issue, or any other plea and not *nul tiel corporation*, it would have been an admission of the corporate existence of the bank and its right to sue. But there is a decision in our favor on this point in the highest court in the country; *Society for the Propagation, &c. v. The Town of Pawlet*, 4 Peters, 500, where in considering this very point the court say,

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"The general issue is pleaded, which admits the competency of the plaintiffs to sue in the corporate capacity in which they have sued. If the defendants meant to have insisted upon the want of a corporate capacity in plaintiffs to sue, it should have been insisted upon by *special plea* in *abatement or bar, &c.*" These authorities, it seems to me, are decisive of this point. But independently of these direct decisions upon the general principles and analogies of special pleading, the court below erred, unquestionably. The decision is placed on the ground, and so are all the authorities cited by the bank, that the plea of *nul tiel corporation* denies a fact which the bank is bound to prove on the general issue, and that, therefore, the plea amounts to the general issue. That the bank would *not* be bound to prove its corporate existence on such an issue, the authorities I have above referred to conclusively establish. But the court below and the counsel for the bank seem to have forgotten that in this case there is no general issue, and consequently, if the ground they assumed was correct, it has no application to this case. We could have pleaded no plea other than the one we did plead, which would have required proof of the corporate existence of the bank. This is an action of debt on a record; *nil debet*, which is the general issue in action of debt, would not have been a good plea in this action. *Nul tiel record* only puts in issue the existence of the record; therefore, as *nul tiel corporation* does *not* in this case amount to the general issue, because there is no general issue, the only reason for the decision of the court below fails, and this court must decide that the district court erred in sustaining the demurrer.

If the plea of *nul tiel corporation* had been bad, however, the authorities cited by plaintiff below show that it is only bad on *special* demurrer. That is the only way of taking advantage of it. The court will see that the demurrer in this case is general. We, therefore, conclude that all the errors we have assigned are well assigned, and

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that the judgment of the court below must upon all of them be reversed.

Defendant in error objects that the plea is bad, however, in this particular case, on another ground. That this suit was brought on a judgment that we might have pleaded *nul tiel corporation* in the original suit; and not having done so, we cannot now go behind the judgment and plead anything we might have pleaded in the original suit. Our plea shows that we attempt no such thing. It does not deny the corporate existence of the bank at the commencement of the first suit, but only at the commencement of this suit in Iowa. All pleas refer to the commencement of the suit in which they are pleaded, and in this case expressly. Now, if the charter of this bank had expired before the commencement of this suit in district court, and contained no provisions for collecting its debts or instituting or prosecuting suits, therefore, after such expiration, it would not have had such corporate existence as to have been able to bring this suit; and the proper plea for defendant below, to avail himself of such a state of facts, was by this very plea of *nul tiel corporation* pleaded in bar, and he could avail himself of it in no other way. Or suppose this charter had been adjudged by the proper court of New York forfeited, and persons appointed legally to wind up its affairs, collect its dues, and pay its debts, those persons would have been the only persons who could sue on the judgment, and not a bank whose corporate existence had ended. Suppose such to be the case in this instance. If the court affirm the judgment below on this point, and the money is collected from plaintiffs in error, some time hence those persons appointed to wind up the affairs of this bank may sue us upon this same judgment of the New York court, and recover the amount again of us; for the judgment in this case, in the name of a corporation which was out of existence, would be no bar to such suit. This proposition is undeniable. If this bank was not legally in existence, if its charter had expired in any way or had been declared

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by a competent court forfeited, before the commencement of this suit in the Scott County district court; then the bank had no such corporate existence as to be competent to sue, and the authorities above cited show that this want of corporate existence or capacity to sue, could only be taken advantage of by the plea of *nul tiel corporation*.

James Grant, for the defendant, submitted the following argument before his election to the office of district judge.

Before the court examines the first and second error relied on, I wish to make this preliminary objection; that the causes of error therein set forth are no part of the record, not having been made so by bill of exceptions: and on these points I refer the court to the following authorities:

"The judgment of a circuit court overruling a motion to quash the writ, or reject a plea in abatement, is no part of the record, unless made so by bill of exceptions." *Hinton v. Brown*, 1 Blackf. 429.

"A plea rejected on motion is no part of the record, unless made so by bill of exceptions." *Henderson v. Reed*, 1 Blackf. 347.

"The *capias ad respondendum* is no part of the record, unless made so in some legitimate way." *Shields v. Cunningham*, 1 Blackf. 86.

"The circumstance of its being spread before us by the clerk, can add nothing to its validity." Same case, p. 86.

"Neither the *capias ad respondendum*, nor the sheriff's return on it, can be noticed by this court, unless made a part of the record in some way known to the law." *Hays v. McKee*, 2 Blackf. 11.

"Neither an affidavit for continuance, nor any objection of a party to the ordering a cause for trial, is any part of the record, unless made so by bill of exceptions." *Wilson v. Coles*, 2 Blackf. 402.

"The dismissal of a cause," (or any other act of court in a cause,) "without any reason for or against it, is presumed to be correct." *Ross v. Miner*, 3 Blackf. 362.

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"A bill of exceptions relative to the affidavit and bond in this case stated, "which affidavit and bond are made part of record." Held, that this statement did not make the affidavit and bond a part of the record, and that to make them so, by means of a bill of exceptions, they should be copied into it." *Huff v. Gilbert*, 4 Blackf. 20.

"It is said that there was a motion to quash the writ in this case, and that the motion was improperly overruled. But as the writ is not invested in the record, we have no means of examining the objection, and must presume the decision of the court to be correct." *State Bank v. Brooks*, 4 Blackf. 485.

"The reasons filed by a party, as the foundation for a motion in the circuit court, do not thereby become a part of the record. To make them so, they must be embodied in a bill of exceptions." *Van Landingham v. Fellows*, 1 Scam. 233.

But suppose the question on the first assignment of errors before the court, and the affidavits, writs, &c., all properly under consideration, the decision of the court below is correct. It appears that an affidavit was made by one of the plaintiffs in due form of law, before one Hamilton, a clerk of the circuit of Steuben county, New York. It appears also by affidavits on file, which were before the court below without objection, that the said Hamilton was clerk of said court, that he was authorized to administer oaths whenever they were required or authorized by law, (and such is the law of New York, 2 Revised Laws New York, 213, which was also before the court,) and that the handwriting of Hamilton signed to the affidavit, is his proper handwriting.

The objection in this case was too late, bail had been given and accepted. "If the defendant has taken any steps admitting that he was bound to submit to its operation, it will be too late to object. Therefore it is too late to object on summons, or motion to such affidavit, after the defendant has put in bail," &c. 1 Chitty's Genl. Pr. 516, also 340; also to the same effect, 1 Dunlap's Practice, 108; 1 Term, 375; 1 East. 330.

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The authorities are however conclusive, that this affidavit is sufficient.

In the case of *S. J. Walrond v. Jacob Senior and Van More*, 8 Modern R. 323 ; " The court held, that a plaintiff who was in Holland might make an affidavit there, and get it attested by a notary, and that it should be admitted as evidence to hold the defendant to special bail here."

In *Onecaly v. Newell*, 8 East. 370, the question is fully investigated, and it was there, after examining all the cases, decided that "an affidavit of debt made by the plaintiff residing in a foreign country before a foreign magistrate, whose signature to the jurat, and his authority in that country to administer oaths and take affidavits, where verified by proper affidavit, is a sufficient foundation for a judge's order, to hold the defendant to special bail."

But it is said our statute intended to require the affidavit to be made here. It is difficult to discover any such intention, and if we look to the object of the statute, we would suppose they intended otherwise. Again, our sister states are not foreign states ; they are confederacies ; just as much so, for the purposes of justice, as England and Scotland, or Ireland, and the practice of using affidavits in England made in Scotland or Ireland, has never even been questioned. See 8 East. 310, et seq.

The plaintiffs in error might just as well say, that the statute intended that no non-resident creditor should collect the debts of his runaway debtor, unless he would travel two thousand miles to make an affidavit to catch him.

The third error assigned is, that the court erred in sustaining a demurrer to the plea of no corporation, filed by the plaintiffs in error.

The court will bear in mind, that this action is debt on a record judgment rendered in the state of New York, and no plea could be filed to the action here which could not be filed in New York.

We assert, that a plea of no corporation is not a good plea in any case, it being tantamount to the general issue, and it

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has been so decided in 19 Johnson ; no precedent for such a plea in any case has been found for the last three hundred years.

In the *Bank of Auburn v. Weed*, 19 Johnson, 300, in which a plea of no corporation was filed, "This is the test, whether a plea in bar is bad as amounting to the general issue ; any matter of defence, which denies what the plaintiff on general issue would be bound to prove, may, and ought to be given in evidence under the general issue, and a plea, setting up negatively such facts, is bad on special demurrer. 1 Chitty's P. 497 ; 1 Tidd's Pr. 599-600.

"It has been decided, 8 Johnson R. 378 ; 14 Johnson, 244 ; Hobart, 211, 212, and Lord Raymond, 15-25, that the plaintiffs are bound to prove, as part of their title, that they are an incorporation. Though there are precedents of the plea of no corporation, yet it is opposed to the principles of good pleading in modern times, and ought not to be allowed," and judgment was rendered for plaintiffs.

But whatever may be the general rule as to such a plea, in this case, past question, it is not allowable ; the defendants below suffered a judgment to be rendered against them, thereby creating the highest species of contract, and where the defendants have contracted with the plaintiff as a corporation, they are estopped from denying the existence of the corporation.

"Where an action is brought on a judgment of another state, no plea will be good, except such as would be allowed in the courts of that state." 1 Story's Pleading, 337 ; 9 Mass. 464 ; 15 Johnson, 121 ; 1 Dallas, 261.

"A man may be estopped by his own pleading, or by an admission or confession on record, or by not denying a matter alleged on record." Story's Pleading, 44 ; 1 Salkeld, 8, 3, 276 ; 2 New H. 450 ; 4 Mass. 443 ; 2 Saunders, 3, note 2.

"Where the matter of estoppel appears on record in the same action, advantage may be taken of it on general demurrer ; but if it do not so appear, it must be pleaded." Story's Pleading, 47 ; 11 Coke, 52, and Hob. 206, 207 ; 2

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Lord Raymond, 1052, 1054, 1540; 2 Salkeld, 267; 1 Saunders, 325, n. 4; 2 Strange, 817; Barn. and Ald. 662; 3 East. 346.

It was admitted below, that the judgment on which suit was brought is the highest species of contract; if it is denied, I refer to 20 American Jurist, page 4.

In Angell on corporations, 581, it is said, "If a corporation sues on a contract, and it appear that the defendants entered into the contract with the plaintiffs, under their corporate name, it is an *admission which estops* the defendant from denying them to be a duly constituted body politic and corporate under such name." In this case Cooks have contracted with the defendants by a judgment under their corporate name.

It was laid down by counsel, and it appears to have been adopted by the court, that the plaintiffs in error were estopped by the recognizance they had entered into with the defendants in error, (the Dutch West India Company,) from saying there was no such company. *Henngins v. Dutch West India Compauy*, 1 Ld. Raymond, 1535.

This case was cited and relied on by Thompson C. J., in the state of New York, the decision in which case was, that those who subscribe for stock in an incorporated company, by signing an agreement by which they promise to pay the company a certain sum, set opposite their names, cannot object that the corporation is not duly constituted." *Dutchess Man. Com. v. Davis*, 14 John. 238.

In same case, Thompson says, "But the defendant having undertaken to enter into a contract with the plaintiffs, in their corporate name, he thereby admits them to be a duly constituted body, politic and corporate, under that name." Page 245.

In a very late case in New York, it was the opinion of the court, that the giving a note to a bank, on which note suit was brought, together with the admissions of the defendant, that he had been president of the bank, show that it had been actually in operation, doing business as a banking institu-

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tion." *Bank Michigan v. Williams*, and causes there cited, 5 Wendell, 478.

No rule of law is better settled than the one, that an action of debt is attainable on a judgment of a court of record. Between the parties, the *judgment is the most conclusive* evidence of indebtedness. *Greathouse v. Smith*, 3 Scammon, 541.

These authorities show that the defendants are estopped from pleading no corporation, if it was a good plea, and that the estoppel appears of record, and is ground of demurrer to the plea. See also 3 Scam. R. 301.

But it was argued below, that the corporation may have suffered a civil death, after the rendition of the judgment in New York. I believe it is the doctrine of the defendants, that corporations never die; but if they do, I suppose the same rule applies to pleading their death, as that of an individual plaintiff; it is ground of *abatement*, not a bar to the action. Such is the authority in 1 Chitty's Pleadings, 21, 483:

"Pleas in abatement are divided into those relating to the disability of the person, &c.

"Pleas to the disability of the plaintiff show that he is incapable of commencing or continuing his suit, by denying his existence, &c." Chitty P. 482, 483.

It needs no argument to show, that the same rules apply to corporations as to private persons.

The fourth and last error assigned is, that the court erred in refusing to stay proceedings in the entire action, after the plaintiffs in error had sued out a writ of error to the decision of the court on the demurrer to the plea of no corporation.

How this court can know whether the court proceeded after the writ of error, I cannot tell. The writ of error commands the clerk to certify what has taken place before the granting of the writ, not what takes place afterwards.

I suppose, if there is anything wrong about the matter, a prohibition is the proper remedy, not a writ of error.

The first section of act 1843, page 6, gives the supreme

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court appellate jurisdiction over all final and interlocutory decrees, orders, judgments, &c., of the district court.

The 16th section, page 7, says, "No writ of error shall stay or supersede the execution upon any judgment of the district court, unless the party applying, &c."

Of course it is not contended that we have issued or intend to issue an execution on the judgment rendered on the demurrer; and the writ of error stays nothing but the *execution* on the *judgment* complained of.

It is a good rule to construe statutes according to the objects of the makers, in remedying a particular evil. Before this law no writ of error was allowed to an interlocutory judgment: that was the evil to be remedied: but could it be designed thereby to inflict a greater evil on the adverse party? The argument from inconvenience shows its utter absurdity. If the rule prevails for which our opponents contend, I could keep a man out of a promissory note twenty years. I would make six different motions about the process,—not served, no seal, wrong test, not served in time, nor by proper officer, &c. &c.,—and each one of these would take a year. Then I would keep it off ten years longer by various pleas, motions, demurrers, affidavits to continue, applications for new trials, and then four more in arrests of judgment, applications for setting aside writs of *fi. fa.*, and finally wind up by an injunction in equity, and keep a man out of it forever.

This last ground is abandoned, the court below having stayed all proceedings in the case.

Opinion by HASTINGS, C. J. No assignment of error can be found among the papers in this case, yet from the argument of counsel it appears an assignment existed at the time of filing the written arguments. The first question, is a motion to set aside a bail bond, a part of the record? If so, we can inspect the sufficiency of the affidavit to hold to bail, and also of the writ. This question has been settled repeatedly in this court, following the decisions of the late

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territorial supreme court, which seems to have adopted the Indiana and Illinois practice, that a motion, and the reason in support of the same are no part of the record in a case unless made so by bill of exceptions. Inasmuch as this is the established doctrine of this court, we are not now disposed to reverse it, being supported by the numerous authorities referred to by the defendants' attorney. We see nothing in argument that will justify us in reversing this case because the court below rejected the plea in abatement. The party did not except to the ruling of the court in rejecting this plea, by embodying the reason of the court in a bill of exceptions, nor is it at all clear that such a plea should be entertained; and inasmuch as the defendants below filed a plea of *nul tiel corporation*, and seemed to rest their defence upon that plea, it will be presumed the plea in abatement was waived, or that the objections to the ruling of the court in rejecting the plea were abandoned by the party's subsequent pleading.

We think the numerous references made by defendants' attorney in support of the demurrer to the plea of no corporation, clearly show that such a plea should be in substance a plea in abatement. The matter alleged goes to the disability of the plaintiffs below, viz. that there is no such corporation. The plea filed sets forth that there was then no such being as the plaintiff in existence. The judgment rendered in New York is conclusive as to the fact of the existence of the corporation at the time of its rendition. If then the corporation has since ceased to exist from any cause whatever, its dissolution should be taken advantage of only in the same manner as the death of a natural person.

The judgment of the court below is affirmed.

The State v. Carothers.

THE STATE v. CAROTHERS.

Prosecuting attorney authorized, by virtue of his office, to follow and conduct a criminal prosecution, commenced within his county, into any other county or court, to which the case may be taken by change of venue or by writ of error.

An attorney of the court, not required to show authority to appear in a case; it will be presumed till the contrary is shown.

ERROR, to Louisa District Court.

W. G. Woodward, for the plaintiff in error.

S. Whicher, for the defendant.

Opinion by GREENE, J. The appearance of the attorney for the plaintiff in error is objected to, on the assumption that a prosecuting attorney has no right to appear and conduct a criminal case, after it has been taken by a change of venue beyond the limits of his county or district; and that the attorney of the county to which the venue is changed, is the only one who has a legal right to conduct the cause in behalf of the state.

It is a well-established presumption of law, that a regular attorney has full authority to bring and continue a suit to its final determination, in the manner in which he prosecutes. He cannot be called upon to prove his authority, but the want of it must be shown by the objecting party. 2 South. 817. Nor can his authority to appear be questioned in this court, if not objected to in the court below. *Noble v. Bank of Ky.*, 3 A. K. Marsh. 263.

The prosecuting attorney of one county has, we think, full authority to follow and prosecute his suit in any other county to which the venue may be changed, and to conduct the case through all its changes to final adjudication. This authority is a necessary incident to the office. He is employed and feed, by virtue of his office, to commence and prosecute all suits originating in his county, in behalf of the state, and

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his authority to act should necessarily continue wherever jurisdiction is entertained. His jurisdiction is co-extensive with that of the case, and should follow it to its final conclusion.

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The statute limiting writs of error to the respective appellate districts, extends to the county in which the trial was had by change of venue, rather than to the county in which the cause originated.

ERROR, to Louisa District Court.

On a motion to dismiss the writ of error.

S. Whicker, for the motion.

W. G. Woodward, contra.

Opinion by GREENE, J. A motion is made in this case to dismiss the writ of error, for the reason that it extends to a county not embraced within the fourth judicial district. It appears that the case originated in Muscatine county, and the venue changed to Louisa county, in which the trial was had. The cause having been commenced in Muscatine county, and that county being attached to the supreme court for the fourth district, it is claimed that the writ was properly sued from this court rather than from the court of the first district, which includes Louisa county. The third section of an act to reorganize the supreme court, Statute of 1848, p. 15, provides "that all cases of appeals or writs of error, shall in future be taken to the supreme court of the district in which they originated." This we think does not apply to the counties particularly in which suits are instituted, but rather to those in which the trials are had, and in which the

Carson v. Duncan.

cause of appeal, or ground of error originated; limiting the operation of the section to those counties only from which appeals can be taken, or to which writs of error can be directed, in order to bring up cases to the supreme court.

Motion granted.

CARSON V. DUNCAN.

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Where a credit, endorsed upon the back of a note, was partly erased, and a certificate attached signed by two persons, that the endorsement was made by mistake, it was held that such certificate is not *per se* evidence of the fact therein stated.

Such credit can only be erased by authority of the party in whose favor it was given.

ERROR, to Linn District Court.

This was an action of assumpsit on a promissory note, made by W. J. Carson to J. K. Rickey or bearer, for the sum of one hundred dollars. A credit and certificate appear upon the back of the note, as set forth in the opinion.

Norman W. Isbell, for the plaintiff in error.

Lowe and Butler, for the defendant.

Opinion by HASTINGS, C. J. On the back of the note in controversy was the following endorsement:—

“Received, on the within note, sixty dollars, September 1st, 1841, by John Carson, jr.” Through this endorsement were drawn two lines, with apparent intention to erase it, and below it was written the following certificate, viz.: “We certify that this endorsement was made in mistake.

CYRUS CLARK,
JOHN CARSON.”

Perry v. Denson.

It appears from the record, that the court below rejected the amount credited on the back of the note, without any other testimony than the above certificate to show that the credit was properly erased. This, we think, was error.

If the credit was made by mistake, the plaintiff should have proved the mistake by some witness who knew the fact. The certificate was not *per se* evidence of the fact.

The presumption of law is then in favor of the allowance of the erased credit, subject to be rebutted by testimony. See Chitty on Bills, Appendix, 820 ; 7 Louisiana R. 356.

From the record it appears that the credit ought to have been allowed, and therefore the court erred in rejecting it.

A credit on the back of a note cannot be erased by any person, except the party in whose favor the credit is given, or by some person by him authorized ; and an erasure of a credit by a payee, corruptly made, is as criminal as an alteration of the face of a note itself, and the holder of the note should explain such erasure before he should be permitted to recover.

The judgment is therefore reversed, and a new trial awarded.

Judgment reversed.

PERRY *et al.* v. DENSON. (1)

A judgment against a surety for costs, should not exceed the penalty of the bond or recognizance.

ERROR, to Cedar District Court.

John P. Cook, for the plaintiff in error.

S. Whicher, for the defendant.

(1) Judge Hastings, having been of counsel, took no part in the decision of this case.

Perry v. Denson.

Opinion by KINNEY, J. This was a case appealed by Perry from the judgment of a justice of the peace to the Cedar county district court. An appeal bond was filed before the justice for the sum of seventy-five dollars, conditioned according to the statute, with William Thorn as security.

In the district court a rule was taken upon the plaintiff in the appeal, to give additional security. The rule was not complied with, and the cause was dismissed and a judgment rendered against Perry the appellant and Thorn his security, for the sum of \$3.39 debt, and \$17.48 costs, on the judgment of the court below, and \$155.66 the costs in the district court.

A bill of exceptions was taken to the decision of the court, and the only error assigned worthy of notice is, "That the court erred in rendering judgment against William Thorn for a greater amount than his bond for the appeal.

This error appears to us to be well taken, although the statute provides that in all cases of appeal from a justice's court, if the judgment of the justice be affirmed, or if on a trial anew in the district court the judgment be against the appellant, such judgment shall be rendered against him and his securities, in the recognizance for the appeal."⁽¹⁾ Yet we do not think this statute will authorize the rendition of a judgment beyond the liability fixed by the party who becomes security for the appeal.

The statute clearly contemplates that the justice, in fixing the amount of the recognizance, in the appeal bond, shall make it sufficient to cover the amount of the judgment rendered in the district court, and all costs. Upon application of the defendant in the appeal, if the court are not satisfied that this bond is sufficient, either in amount or otherwise, they may require the appellant to give new and additional security. *Rev. Stat.* p. 335, § 11.

This statute was evidently intended to preserve those cases in which the justice had taken a defective recognizance.

(¹) See *Rev. Stat.* p. 336, § 8.

Morrow v. Carpenter.

The error of the justice, therefore, in taking insufficient security, cannot prejudice the interest of the defendant in the appeal, if the district court has the power to require the plaintiff to give further and additional security; and hence the great impropriety of the court in rendering a judgment against the security, for a larger amount than the sum placed in the bond, fixing the liability of the party becoming security.

The defendant, Thorn, in this case, became security for the sum of \$75, and although the condition of the bond was that Perry should pay all the costs in the district court, in case the appeal was dismissed or the judgment affirmed, yet the amount having been fixed by the justice, who is presumed to have placed it sufficiently high to cover the judgment and costs, and Thorn having signed the bond with a reference to confining his liability to that amount; and the court, as we think, having the power upon proper application to require of the plaintiff additional security or a new recognizance, and consequently no necessity for the courts rendering a judgment for more than the amount of the recognizance; we think it was error in the court below, to have rendered a judgment against Thorn, the security, for more than seventy-five dollars, the amount mentioned in the appeal bond.

The judgment of the court below is reversed, unless the defendant in error enters a *remittitur* for all over seventy-five dollars, against Thorn, the security.

Judgment reversed.

MORROW v. CARPENTER.

Any appearance or acquiescence in the proceedings of a suit in the supreme court, will be regarded as a waiver of the notice of suing out a writ of error. The want of such notice should be taken advantage of within a reasonable time, and before any other proceeding or appearance in the case.

Thomas v. Isett.

ERROR, to Muscatine District Court.

On a motion to affirm the judgment for want of notice.

Jacob Butler, for the motion.

S. Whicher, contra.

GREENE, J. The motion to affirm for want of the requisite notice, is not granted. Any appearance or acquiescence in the proceedings of a suit, must be regarded as a waiver of notice. In this case, counsel for the defendant in error appeared at the last term of this court, consented to the substitution of the administrators as parties to the suit, and sanctioned the continuance of the cause. The want of notice should be taken advantage of within a reasonable time, and before the party who claims it has made any appearance or sanctioned any proceeding in the case; otherwise the service of notice, or a waiver of it, will be presumed by the court.

Motion denied.

THOMAS *et al.* v. ISETT.

In an action for trespass, of seizing and detaining goods, the belief or opinion of a merchant, that the plaintiff had sustained injury in credit as a merchant, to a specified amount, is not admissible. The testimony of the witness should be limited to the facts, and the jury will estimate damages from those facts.

Loss of credit in such an action cannot be proved, until it appears to be intimately connected with the act complained of, and to have been done with an aggravating and malicious intention to injure the party complaining.

ERROR, to Louisa District Court.

J. C. Hall and *H. W. Starr*, for the plaintiffs in error,

Thomas v. Isett.

contended, 1st. That the issue confines the evidence of the plaintiffs below to the following points: 1. The committing of the act alleged; 2. The attendant circumstances. The evidence should be given to the jury, 1. To prove the real injury done to plaintiff on his property, in order to compensate him for the loss sustained; 2. Attendant circumstances of aggravation, which consists in evidence of the intent and manner of committing the act of trespass.

2d. In proving the attending circumstances, for the purpose of compensation, the plaintiff can only rely upon those consequential results, where the law implies or would give general damages, that is, where damages are the natural consequences of the principal fact proved. 4 Blackf. 348; 8 John. 446; 14 ib. 272; 5 Cowen, 587; 4 ib. 53; 2 John. 280; 2 New Hamp. 135; 14 Wend. 90; 18 ib. 78; 4 Blackf. 277; 1 Payne, 111; 3 Dallas, 333; 3 Wheaton, 546; 5 ib. 385; 2 Greenl. Ev. p. 209, † 252 to 275; 2 Stark. Ev. 1111-1114 and note.

3d. Plaintiffs contend, that the evidence admitted to prove loss in custom,—loss in profits,—loss of reputation as a merchant, was error, because, 1. The evidence proves double damages, loss of custom and loss of profits, inasmuch as custom is only valuable for the profits. 2. It is not a subject of damages; it did not show intent or motive, nor injury sustained to property that is subject of trespass. 1 Chitty, 150, 428, and cases cited above.

4th. The plaintiffs contend, that there was error in admitting the opinions of witness, as to amount of damages sustained, opinion as to injury to character, loss of custom, &c. 10 John. 281; 1 Greenl. Ev. 488, 491; 3 Hill, 610; 5 Barn. and Ald. 840.

W. G. Woodward and *R. P. Lowe*, for the defendant, on the subject of damages, and particularly of *special* damage, and what must be proved under a claim of special damage.

In this action *special* damages are claimed, and in such

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case we hold that they must be proved, and the amount of special damage. 2 Greenl. Ev. 209 et seq., and §§ 254, 267, 268; 1 Chit. Pl. 428 v. to 428 cl.; 8 Am. Com. Law, 202, 203, 206, 207; 1 Baldwin 59, 142; 2 Phil. Ev. 188; 19 John. 382; 4 Peter's Cond. R. 328; 3 Har. and M. Hen. 510; 1 Mass. 12.

Opinion by HASTINGS, C. J. The defendant sued the plaintiffs in an action of trespass, for seizing the goods of defendant of the value of \$3487.58, and detaining the same about four months, and thereby injuring the defendant's goods, custom, and business, as a merchant, and his credit as such, and for other injuries, &c., &c.

It appears from the record, that the plaintiffs, Postelwait and Craigen, sued I. W. Isett, by process of attachment, and the plaintiff, Thomas, being the sheriff of Louisa county, attached the goods specified in defendant's declaration, as the goods of said I. W. Isett, detained them for the time specified in said declaration, and returned them. During the trial, ten bills of exception were taken and allowed, and as many errors are assigned. It appears from the second bill of exceptions, that the court permitted defendant to prove before the jury by a merchant, his belief that the taking goods in the declaration specified, injured the defendant's credit as a merchant. This we think was error. Although it is true that the belief and opinions of certain classes of persons are legitimate testimony to a jury, such kind of testimony is contrary to a general rule of law.

We do not think that the belief of the witness specified in this bill of exceptions, should have gone to the jury. It was the province of the jury to deliberate upon the facts submitted to them, and from the facts submitted, to infer the injury complained of. On questions of science, skill, or trade, experts are allowed to testify their opinions or belief; and in 1 Greenl. Ev. 515, the various cases in which such kind of testimony will be received, are enumerated and commented upon. The opinion or belief must be pertinent to the matter

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of science, skill, or trade, and having a tendency to develop certain facts, about which none are supposed to be so well informed as an adept. The defendant's credit as a merchant was not so involved in the mysteries of trade as to require only a merchant to entertain a sound opinion in relation to it, and to make him any better judge of the value of such credit, than the jurors themselves.

The fifth bill of exceptions sets forth several questions put to a witness who had been a merchant, and his answers thereto, and among other questions was the following, viz.: "Taking Mr. Isett's trade as you knew it to be in the spring of 1843, and have \$2200 or \$3000 taken at once out of the store for four or five months, what would have been the damage to him?"

Ans. "The amount of profits, I should suppose, would be about \$500. The loss of credit and the loss of custom, would be at least as much more." Which question and answer were objected to, and objection overruled by the court, and the answer received as testimony. The witness's statement of the amount of profits, and his subsequent reasons for that statement, may have been properly admitted to the jury; but the witness's assessment of \$500 damages, for loss of credit, should not have been admitted to the jury, especially under the ruling of the court. It is difficult to interpret the meaning of the witness. He fixes the value of the profits at \$500, and damages for loss of credit and *custom* at as much more. Custom is understood in mercantile parlance to mean a buying of goods, as to give one's custom to a tradesman, and is so commonly understood among men. The word then means nothing in the answer of the witness, as he had just before assessed \$500 for the custom or profits, and leaves them \$500 assessed for the loss of credit.

The jury should have been permitted to fix the amount of damages for the loss of credit, if such damages could be recovered in this action; and it was error in the court to permit a witness to throw into the jury box, an assessment of damages for what had not been proved to exist.

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It might have been proper for the witness to state facts which would show a loss of credit and character, provided such loss could be connected with, and was directly consequent to, the wrongful taking or acts complained of.

This witness was called upon to state the reason for his opinion, and did undertake to give to the jury a reason for his estimate on the loss of profits; but he does not give a reason for the same estimate on the loss of credit, and we think his making an estimate of \$500 for loss of credit and custom should have been overruled, and not permitted to go to the jury.

The case cited by plaintiff's attorney, *Herrick v. Lapham*, 10 John. 284, sustains the views we have expressed. The verdict in that case was set aside, for the reason that witnesses were permitted to express their opinion of the loss of reputation of the plaintiff as a merchant, and the court say, "To call upon witnesses to say whether a party has not sustained or suffered a material injury, by reason of the slander, is asking their opinion only, and putting them in the place of the jury, to draw conclusions from the facts proved in the case. This cannot be admitted."

If this could not be done in an action for slander, of the kind above referred to, much less could the witness in this case express his opinion as to the loss of credit, and assess the damages thereon.

The record does not disclose proof of circumstances of aggravation, nor evidence that the plaintiffs acted wilfully and maliciously, with a view to injure the credit of defendant as a merchant; and without such proof, it would be highly unjust to permit evidence to go to a jury of a loss of credit, on the loose opinions of witnesses. If the loss of credit had been a thing proximate to, and consequent upon, the acts complained of, and one of the attending circumstances of a trespass of the kind, testimony of such loss, properly elicited, would have been proper. 2 Greenl. Ev. § 256; 2 Starkie on Slan. 57.

But we believe a loss of credit in such a case as this

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record discloses, is too remote a thing to be presumed from the acts complained of; and before the party could prove such loss, he should have connected it with the act done, by showing a guilty and malicious intention in the party doing the act, so to injure the party complaining. Such evidence could not even be received as matter of aggravation, without proof that the circumstances showing loss of credit belonged to the act complained of. 2 Greenl. Ev. § 266, and note.

The following general principles are settled in one of the cases to which reference is made, *Pacific Insurance Co. v. Conard*, 1 Bald. 138 :

In an action of trespass for seizing property under judicial process by a public officer, the party trespassing is liable for the value of the property taken, with interest from the time of taking down to the trial; but the party may be liable for damages resulting to the owner by the trespass, provided there is an abuse of the process, or the property was taken under circumstances of aggravation :

That vindictive, imaginary, or speculative damages ought not to be given in such cases, unless the trespass be committed in a wanton, rude, and aggravated manner, indicating malice or a desire to injure.

There are no extraordinary circumstances of aggravation attending the seizing of the goods specified in this case. Nothing appears of record which shows that the process was wantonly and maliciously sued out, and that the goods were levied upon with a preconceived and wicked determination to produce the result of loss of credit and reputation to the party; and without such averments and proof, the evidence of damages for such loss of credit ought not to have been submitted to the jury.

The objection to the testimony of a merchant as to his belief, as specified in the second bill of exceptions, was well taken, and the court below erred in overruling such objection; and also erred in permitting the testimony of the witness specified in the fifth bill of exceptions to go to the jury, in relation to loss of credit of the defendant as a merchant, and

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the opinion of the witness as to the amount of damages sustained from such supposed loss of credit, especially after the witness had omitted to give to the jury his reasons for his estimates and opinions, after having been directly called upon by the defendant to favor the jury with his reasons therefor.

We see no objection to permitting the testimony of the witness's estimate of the loss of profits going to the jury.

The loss of profits was a consequence which would necessarily follow the act complained of; and, inasmuch as the action was brought for recovery for such loss and damages to the goods, we see no objection to the witness's testifying to such loss, and in making an estimate thereof, and assigning his reasons for such estimate, as was done in this case.

The judgment will therefore be reversed, for the reasons above stated, and a new trial awarded, which renders it unnecessary to examine the other errors assigned.

PLATNER v. MOFFORD *et al.*

Where a bill of exceptions came up, without date, was detached from, and not referred to, in the transcript of the record, and nothing to show that exceptions had been taken, it was rejected.

ERROR, to Linn District Court.

J. P. Cook, for the plaintiff in error.

S. Whicher, for the defendant.

Opinion by KINNEY, J. A motion is made in this case to reject from the files a paper purporting to be a bill of

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exceptions, for the reason that it does not appear in the transcript that any bill of exceptions was taken in the trial; that the exceptions on file are not attached to the record, and that they were filed the present term of this court, and the record of the case was filed at the July term, 1847.

The bill of exceptions, it is true, appears to have been signed by the Honorable Thomas S. Wilson, but of what date the exceptions do not show. The same parties appear in the bill, and it seems to have been taken at the same term of the court at which the case was tried. As the record does not show that any exceptions were taken in the case upon which the writ of error was sued out, we think we should do great violence to the well-established practice of taking bills of exceptions; to regard the paper on file as a bill of exceptions in the case.

This court has settled the practice in relation to taking bills of exceptions, and the necessity of embodying them in the record, too frequently for us at this time to show the propriety of such a practice.

The paper therefore, on file, purporting to be a bill of exceptions, is rejected; and as there does not appear to be any error in the record, we cannot disturb the judgment of the court below in this case.

Motion granted, and judgment affirmed.

HUMPHREYS *et al.* v. HUMPHREYS.

A special plea to an action on a delivery bond is good, which alleges that a judgment *in rem* had been rendered against particular property, and that instead of taking the property so held for the debt, the sheriff levied upon other property not affected by the judgment. As the levy was unauthorized and void, the sheriff had no authority to exact a delivery bond, and the obligors were under no legal restraint to replace the property in his possession.

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A plea, in such an action, that the sheriff was not in attendance at the time and place designated for the delivery of the property, is not sufficient.

In such an action a plea is good, which alleges that the judgment was rendered under the valuation law, and that the sheriff did not, as required by that law, take to his assistance two disinterested persons, to estimate the value of the property levied upon.

ERROR, to Muscatine District Court.

W. G. Woodward, for the plaintiff in error. This is an action of debt on bond, by which the defendants below undertook to deliver to the plaintiff, (the sheriff,) certain property taken by the sheriff on execution, to be sold.

The defendant pleaded three pleas.

1st Plea. That the suit, on which the execution, by which this property was taken, issued, was a suit by attachment on personal property; that the judgment was special, and that this was a *general* execution, and that the property attached had never been taken and disposed of.

We are not precluded from showing this illegality, by having given a delivery bond. Our property is about to be taken; we must either give a bond, or permit the property to be taken,—perhaps at a serious damage: (notice one piece of this property, a *parlor organ*, which cannot be moved without detriment.)

We hold the following propositions: 1. When the proceeding is illegal or ineffectual, by operation of law, the party may show it in defence.

2. It was illegal to issue a general execution on a special judgment, and to levy on other property, leaving the attached property untaken.

1st Proposition. When the proceeding is illegal or ineffectual, by operation of law, the party may show it in defence. 13 Mass. 93. The following cases show defence upon this principle,—*Ray v. Hogeboom*, 11 John. 433.

It is a good defence to an action for an escape, that the prisoner was privileged from arrest. *Brown v. Littlefield*, 7 Wend. 454.

Held a good defence to action for *escape*, that prisoner was

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not a lawful prisoner, for defect in process. 5 Wend. 113; *Russell v. Turner*, 7 John. 189; *Russell v. Champion*, 7 Wend. 462; 7 East. 405; *Champion v. Noyes*, 12 Mass. 488.

That such defence may be made, see *Atkinson v. Starbuck*, 7 Blackf. 420; Ohio Cond. 361; 1 Saund. Pl. and Ev. 484, 489; and for a very pointed and similar case in many points, see *Miller v. Ashton*, 7 Blackf. 29.

2d Proposition. It was illegal to issue a *general execution*, on a *special judgment*; 2 Scam. 24; and to take other property and leave that which was attached.

This execution issued irregularly in the strict sense, and irregular process is void. A sale, even to an innocent purchaser, under irregular process is void. 1 Cow. 736 and seq. In ejectment, the party may show the want of a *venditioni exponas*, 1 Tidd. 108; 2 ib. 212. A *venditioni exponas* issued irregularly, and the court allowed the objection to be taken collaterally, and held the purchaser acquired no title. *Burd v. Dousdale*, 2 Binn. 80; 3 John. 523.

When a levy is made upon land, and the *fi. fa.* is so returned; if a second *fi. fa.* be issued before the first levy is disposed of, the second *fi. fa.* is void. *Arnold v. Fuller*, 1 Ham. 458.

On the second branch, it was illegal to levy on other property, omitting that attached. The judgment was special, *in rem*. Therefore, if the process on which he took this property, or the proceeding in taking it was illegal, all is void. The officer had no right to take the property, and the bond is nugatory.

2d Plea. The second plea is, that the sheriff did not attend at the time and place, to receive and sell the property. As the plaintiff has demurred to our pleas, we will go back under his demurrer, and consider this matter both as under the demurrer and under our plea. If the matter is available, it is good under a *plea*; and if it ought to be *alleged*, then it is good on demurrer or in error, for then there is no *breach*. I am aware of the common doctrine in relation to promises

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to pay money at a particular place; that it is not necessary, on the part of the payee, to allege a readiness at the place to receive. But is there not a distinction between contracts for the *payment of money*, and for the *delivery of property*?

In 2 Chit. Pl. 138, 105, in a form for not delivering wheat at a specified time, and at a particular place, there is an allegation of readiness *at the place* on the part of the *vendor*. So in 3 Chit. Pl. 187, for not delivering oats at a particular time and place. So in Oliver's Precedents, 97, for not delivering corn. Same, p. 102, for not delivering barley. So, p. 122, in note payable in — gallons of rum, at a place. In all these there is an allegation of presence and readiness *at the place* by the contractor.

But if there be no such distinction between contracts for payment of *money* and for delivery of *property*, yet between a contract to deliver *on a sale* and this contract, there surely is a difference. On a *sale*, a delivery, or a tender passes the property. Not so here. The obligor is an officer—he has a specific *duty*, but no interest—he is to *sell*, and on *that day*, and at that place. If he is not there, he cannot perform that duty. If he is not there, how can the property be delivered to the sheriff, there, at that time, to be sold?

And see the declaration. It is conditioned to deliver to *G. W. H. sheriff, &c., in front of the court-house door, to be sold*. Breach: Did not deliver to *G. W. H. to be sold*.

The *place* is not the gist, but the *person*; and if he was not there, how could we deliver; and if delivered, how could he sell? And is a party in this kind of case bound to have the property forthcoming, and *leave* it, in case the sheriff is not in attendance? See the *kind* of this property.

It is not like the case of a sale where the property would be left at the risk of the vendee.

This matter is certainly good as a plea, then, and perhaps on demurrer to the declaration. See Chit. on Con. 738, as to personal attendance of sheriff.

The *3d Plea* is, that the judgment was under the appraisement law, and the officer did not cause the property to be

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appraised. I suppose, from the fact of the plea pleading the *judgment*, and there being no replication showing the time of the *contract*, that the time of the *judgment* governs as to the manner of sale. For if the contract governed, and not the judgment, the plaintiff should have replied the time of the contract. There are many cases in which the time of the *judgment* governs. If, then, the case came under the valuation law, and the property ought to have been appraised, the sheriff could not sell *without* that appraisement,—his sale would be *void*. A sale without appraisement, where the law requires one, is *void*. 1 Ham. 27; 3 ib. 190; *Curtis v. Doe*, Breese, 102.

If the sheriff could not sell, there was no utility or obligation to deliver the property, as the *only* object of delivering the property is *to sell under the law*, and the only right of the sheriff is as *an officer* under the law, for a specified object.

Another ground of demurrer to the declaration is, that it alleges that an action has accrued to recover "the amount of the Hoop's Execution." And an error in the *judgment* is that which the declaration alleges as above stated; the judgment is for the *penalty*, and so the judgment is not supported by the declaration. And more damage (\$116) is given than is called for by the declaration—to wit, \$95.40, Hoop's Execution.

R. P. Lowe, for the defendant. The three pleas are special, admitting the execution of the bond, but setting up new matter in avoidance of defendant's liability—general demurrer to the same sustained. Defendants below then make an agreement with plaintiff below, to submit the cause to the court on an inquiry of damages. This is equivalent to a judgment by confession, and a consequent release of errors.

We claim that the defendants are estopped *in pais*, by the execution of the delivery bond, from raising any questions touching the legality or regularity of the execution under

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which the levy was made. The act of signing and delivering the bond was a recognition not only of the levy, but the legality of the levy. There would be as little propriety in refusing assent to the latter as the former of these two propositions. A single instance cannot be found on record where in an action on a delivery bond, the defendants have been permitted to allege as a bar to the recovery, the errors or illegality of the proceedings in a former suit or under the execution, and the application of the authorities adduced on the other side upon this point, is distinctly denied. The correct practice, if the execution has improperly issued or been improperly levied, is, for the party aggrieved to move the court to set it aside, and not sanction the levy by giving bond for the delivery of the property, and then afterwards repudiate the levy. This practice offers alimant for litigation, multiplies lawsuits, and necessarily operates as a postponement of the rights of the parties; and we again say that it is without precedent. We again refer the court to 15 Ohio Reports, 445, commencing at the bottom of the page. It is the only reported case that can be found that bears upon the question.

The foregoing remarks apply to the third plea with equal force. The second plea is so obviously defective that it is not deemed worth while further to notice it.

Again, it may be remarked that a special plea, to be good in law, should set forth all the facts and circumstances necessary to constitute a complete bar to the recovery; in this respect the pleas under consideration are at fault. Suits by attachment are commenced as often by personal service as by notice; and in such cases the judgment is *in personam* as well as *in rem*, and under which a general execution could lawfully issue; such was the fact in this case. We contend that the pleader was bound to set out the character of the judgment, whether *in personam* or *in rem*, or both, so that the court could determine whether the facts pleaded amounted to a defence; again we say, the record alluded to in the pleas was the record of the court where this cause was

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tried. The court was bound to notice the character of their own judgments and records when that character is involved in the pleadings of a cause, and in doing so in this case the court would discover that the facts set out in the pleas were not well pleaded. Under such circumstances, how can this court determine whether the court below erred or not in sustaining the demurrer? I will not recapitulate what was said at bar, but leave with confidence the case to the determination of this court.

Opinion by GREENE, J. An action of debt, on a delivery bond against Ansel Humphreys as principal, and Hastings and Woodward as sureties. The defendants below filed three special pleas to the plaintiff's declaration, essentially as follows: 1. That the original suit by *Hoopes v. Humphreys* was commenced by process of attachment, and a special judgment rendered against the property; that the property attached, and against which only judgment was rendered, had not been taken on execution or in any way disposed of to satisfy the judgment, and that the officer made a general levy upon entirely different property.

2. That the sheriff was not in attendance at the time and place designated for the delivery of the property.

3. That the judgment was rendered under the valuation law, and the sheriff did not, as required by that law, take to his assistance two disinterested persons to estimate the fair value of said property under oath.

To these several pleas the plaintiff below demurred. The court sustained the demurrer, and rendered judgment accordingly for the plaintiff.

Though another point is raised in the assignment of errors, it is only necessary for this court to review the action of the district court, in sustaining the demurrer to the several pleas. And first, as to the sufficiency of the first plea in constituting a good bar to the action. We can entertain no doubt, that the execution should have been issued, and the levy made, upon such property only as the writ of attachment and spe-

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cial judgment affected ; and that the proceedings of the officer in levying upon other and different property, was not authorized by law, and therefore void. It is not only necessary that the execution should pursue and be warranted by the judgment, *Palmer v. Palmer*, 2 Conn. 462, but it should be executed according to its special purport and authority, in order to render the proceedings under it valid. A general execution from a special judgment, cannot receive the sanction of law ; and it would be equally irregular for a sheriff having already a lien and property in goods taken by a writ of attachment, to levy upon entirely different goods to satisfy an execution from the same attachment judgment.

The execution levy, as appears by the delivery bond, was made upon property, which, from feelings of attachment and convenience, a family would especially desire to retain in possession, and which, by removal, would be likely to receive considerable injury. To prevent the mortification and injury of the removal, Humphrey's only alternative was to give the bond and security required by the coercive garb of office. There is then no good ground for the pretence that the bond was freely and voluntarily given. It was exacted of the party without lawful consideration or even official justification, under the peril of losing the possession and use of his property. *United States v. Tingey*, 5 Peters, 114.

If conceded that the sheriff had no legal authority to receive and sell the property described in the delivery bond, does it not conclusively follow that the obligors were not by law required to place the property in his possession ? It is well settled that a bond given to an officer for doing or omitting to do, an act which he has no legal authority to perform, is void. Besides the authorities referred to by plaintiff's counsel, see *Moore v. Allen*, 3 J. J. Marsh. 621. Some of the authorities referred to, show that it is equally well settled that whatever would render an arrest or a levy unlawful, may be given in answer, or in bar to an action against the bail or the execution defendant.

However desirable an explicit and full opinion may be,

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upon the leading questions raised in a case, and especially during the early organization of our state judicature; we can see no necessity for saying much in relation to the second plea. Finding neither precedent, principle, nor reason, for the position that the mere absence of the sheriff at the time and place of delivering the property, should relieve the obligors from that liability; we must regard the plea as inadequate, though very plausibly sustained by the argument of plaintiff's counsel.

The third plea shows that the requirements of the valuation law, under which the judgment was rendered, were not carried out by the sheriff. An appraisalment under that law was indispensable, and a sale without it would have been utterly void. To have complied with the fourth section of the valuation law, the sheriff, at the time of making the levy, and before advertising the sale, should have taken "to his assistance two disinterested persons having the qualifications of jurors," and after administering an oath, should have proceeded with them "to estimate the value of each article, or price of personal property levied on, at its fair value." Without having performed this duty, he had no right to advertise, and much less to sell the property; and having no right to sell, the obligation for the delivery of the goods at the particular time and place, to be sold in pursuance of said levy, was inoperative in law, and void.

We are of the opinion that the first and third pleas are sufficient in form, and ample in substance.

Judgment reversed.

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BROWN v. BD. OF COM. OF JOHNSON CO.

A county order, payable out of a special fund to be created, is not due until the fund is created; and judgment cannot be rendered upon it, unless that fact is established; nor does such an order draw interest before the fund is created.

A county order, payable on presentment to the treasurer, is due, and draws interest from the date of such presentment.

ERROR, to Johnson District Court.

R. P. Lowe, for the plaintiff in error.

Curtis Bates, for the defendant.

Opinion by HASTINGS, C. J. This was an amicable suit, originally instituted in the county of Johnson, and submitted to the court upon an agreed statement of facts and testimony. By the agreement: it appears that the plaintiff was the holder of a large amount of orders drawn by the defendants on the treasurer of the county of Johnson, which were presented to him for payment. Two questions were, by the agreement, to be submitted to the court. 1. Can an action be maintained on such paper? 2. If so, do such orders draw interest? If an action could be maintained, judgment was to be rendered.

The following are copies of two of the orders, which are described in the agreed statement of facts, and the only orders submitted to the consideration of the court.

"Territory of Iowa, }
Johnson County, } ss.

"COMMISSIONERS' OFFICE, }
July Session, 1842. }

"The treasurer of Johnson county will pay to Jesse B. McGrew fifty-six dollars, out of any moneys in the county treasury, not otherwise appropriated. By order of the board of commissioners.

"Attest, STEPHEN B. FARDNER, *Clerk.*"

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“ COMMISSIONERS’ OFFICE, } ss.
 Oct. Session, 1841, No. 291. }

“ Agent of the county of Johnson, pay to Wesley Jones & Co., one hundred and thirty-three dollars and sixty-two and one-half cents, out of any moneys in your hands arising from the sale of lots in the county seat of Johnson county, Iowa Territory, now sold, or to be sold hereafter. Per order of the board of county commissioners, (on jail contract.)

“ Attest, STEPHEN B. GARDNER, *Clerk.*”

There does not appear to be much difference in the legal effect of the orders above described. Each is to be paid out of a fund which is uncertain, and on an event which may never happen. Without, then, the assistance of a statute, no action could be entertained on such orders, they being neither bills of exchange nor promissory notes. See Chitty on Bills, 158, and notes. But the statute makes all instruments of writing, whereby a sum of money is acknowledged to be due, a promissory note, or bond, or bill, assignable, and liable to be prosecuted to judgment in the hands of the assignee. If these orders then were due at the time of the institution of this suit, judgment was rightly rendered upon them. It does not appear from the evidence and agreed statement of facts, that the events have happened when these orders should become due and payable. We think, therefore, that judgment ought not to have been rendered for the principal due on the orders, and that an action was not then, at the institution of the suit, maintainable on the same.

But the most important and difficult question to settle is, whether such orders draw interest, and upon this subject there seems to have been as yet but few decisions, and we must be governed by general principles regulating interest on money, rather than specially adjudicated cases cited as authority.

In the case of the *Glass Factory v. Reid*, 5 Cow. R. 588, much light was shed upon the perplexing questions relating

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to interest on money by senator Spencer, and certain principles were laid down by this very able jurist, which will not be controverted, viz. : That an agreement to pay interest may be implied from the custom or usage of the business in which the debt is contracted; and that when such custom is known to the parties, or may reasonably be presumed to have been known, it enters into the original contract, and forms part of it. See the authorities referred to in that case.

And on the same principle, when interest has under like circumstances been allowed by the debtor to other creditors, the knowledge of which comes to the creditor in the given case, and he acts in expectation of a similar allowance, there would be good ground to presume an agreement to pay interest also to the new creditor.

The statute, however, regulating interest on money, and the statutes relating to the finances of counties and the duties of the various county officers, must mainly settle the questions presented in this case.

The board of commissioners are by statute made a body corporate and politic, capable of suing and being sued, and when they credit and allow a debt against the county, we know no good reason why interest should not be allowed upon such debt, from the time the same becomes liquidated and due.

The allowance of interest often becomes a question of equity.

Interest on money was not tolerated at common law. It was condemned in all catholic countries under the odious term of usury, and not permitted in England until the reign of Henry VIII. Its odious character has however yielded to the more sensible demands of trade and commerce, and by common consent, in most commercial countries, it is now regarded as much the right of the creditor, as the principal itself after the debt is due.

It is no longer looked upon as a penalty for a wrong in the delay of judgment, but as an incident to the debt after due, and as much the right of the creditor as the principal itself,

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and is a part of the contract, whether so expressed or not. In the case cited from 1 Scam. 67, the court seem to consider interest as penalty for a wrong committed by the debtor, in failing to pay; and for the reason that the state cannot be guilty of laches, a county can be guilty of no laches by delay in the payment of its debts, and therefore is not liable to payment of interest.

This reasoning appears to us fallacious. The premises are wrong, and therefore the conclusion is erroneous.

The legislature has made the board of commissioners of a county capable of suing and being sued, and evidently contemplates a crisis when the board may be in the wrong, and of their being sued for redress of such wrong.

The court in the case from Scam., for other, and we believe more plausible reasoning, sustain the decision in that case.

The court say, "It might also with propriety be insisted, that the financial means of the respective counties to discharge their debts, were or could have been known by those persons who, either as officers or individuals, became creditors to the county. They may therefore be presumed to have consented to receive the payment of their claims, whenever the revenues of the county would enable it to pay its debts. If this is a reasonable presumption, and it seems to be, then the time of payment of their orders did not arrive until there was money in the treasury to pay them, and provision is made by statute to pay orders according to their seniority."

Our statute has similar provisions relative to the payment of orders according to seniority.

The one order in this case, expressly provides that it is to be paid out of any money not otherwise appropriated. The meaning of which is, that the money is not to be due until funds shall remain in the treasury, (after the payment of senior orders,) sufficient to pay the same. The money is not due on the order, until the happening of that event. The creditor, by accepting of such order, agrees to the condition

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upon which it is drawn, and is not entitled to interest until the event happens; when, if payment should be delayed or refused, he would certainly have a right to interest. The facts that the plaintiff paid but fifty cents on the dollar, that the county of Johnson has never paid interest on such orders, that orders have always been below par, show that the plaintiff is not equitably even entitled to interest. He has already received fifty cents on the dollar in consideration of the postponement of the time when the order shall become due.

In some counties in this state orders are drawn by the boards of commissioners upon the treasurer, to be paid on presentment and without any qualifications. In some counties orders are drawn in both forms. When orders are drawn without the words of limitation as to payment, interest is usually allowed, and we think with great propriety.

The board of commissioners, in such orders, undertake that money is in the hands of treasurer to pay the same; and having the control of the revenues of the county, and for the purpose of giving them character and value, and to be enabled to procure services and property at their true value, they make such orders due on presentment to the treasurer, and from that time pay interest on the same.

The conclusions then to which we are drawn are: 1. That a county order payable out of a fund not otherwise appropriated is not due until such a fund shall exist, and not being due, does not draw interest until after that event happen, and demand and refusal.

2. That a county order payable on presentment to the treasurer without any such limitation is due after presentment to the treasurer, and draws interest thereafter unless paid.

3. That neither of these orders being due when this suit was instituted, the action was not then maintainable.

The judgment therefore of the court below, refusing interest, is affirmed, and that part of the judgment in favor of the plaintiff for the principal, is reversed.

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GREENE, J. dissenting. The reasoning of the opinion in this case I mainly approve, but cannot arrive at the same conclusions. Indeed, I think the second concluding proposition shows the incorrectness of the decision. If a county order payable on presentment draws interest, then are the orders in this case entitled to interest. The first order copied in the opinion directs the treasurer, in unqualified terms, to pay the amount of the order out of any funds in the treasury not otherwise appropriated. This is in the usual form of a treasury order. There is no contingency, no special fund adverted to in the order. It is for funds *in* the treasury, funds *in esse*, and not for funds that are to be placed there, at some future day, out of some contingent resource. To my mind, it is as clearly payable on presentment as any order can be. The first section of the interest law, *Rev. Stat.* p. 293, provides that creditors shall be allowed interest at the rate of six per cent. "on money due, or settlement of accounts, from the day of liquidating or ascertaining the balance due thereon." The money is due—the account is liquidated, from the moment the allowance is made by the commissioners and the usual order of payment is entered upon their record. Without an order upon the treasurer, then, the creditor is entitled to interest, and without such order he may sue before any court of competent jurisdiction for the recovery of his demand and interest. Can the fact that he takes an order militate against his right to sue or to recover interest? It is conceded that the order without payment is no satisfaction of the claim; and the decisions of this court show that a party may file such an instrument for cancellation, and recover on the original demand. It is clear, then, that the nature and merits of the indebtedness will justify a recovery of interest. What is there in the order itself that can preclude such recovery? It is an additional assurance—an acknowledgment of the indebtedness. The clear import of its language is, that the drawers have funds in the hands of the drawee, from which payment is to be made to the payee. If those funds are not

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there, it is not the fault of the payee or holder of the order; his claim still holds against the drawer; and I believe, upon every principle of justice and correct law, he is entitled to interest at the established rate till payment is made. If such an instrument cannot become due till particular funds are placed in the treasury for its particular payment, the drawers of the order having the management and appropriation of those funds, have the power in their own hands to guard forever against the contingency upon which payment would depend. They could manage to have no funds in the treasury not otherwise appropriated. Law and reason cannot be compatible with a construction which leaves room for the perpetration of such fraud and injustice.

Upon the other order there is more room for doubt; but as such instruments are always to be construed strongest against the maker, I do not regard the disjunctive proposition, "or to be sold hereafter," as deferring the day of payment to an indefinite contingency. As the order directs the payment to be made by the agent out of "money in his hands arising from the sale of lots *now* sold," it removes all contingency, and creates a pending liability against the drawer upon which interest should be allowed. I consider the plaintiff in error entitled alike to an action and to interest upon the orders.

The prevailing argument in the opinion of the court and the authorities cited do not, in my opinion, support their conclusion.

TEMPLE *et al.* v. CARSTENS *et al.*

In computing the time of service, before the return day of a writ, the day of service should be included, and the return day excluded.

A judgment rendered against a party not served with process nor declared against, will be reversed.

Temple v. Carstens.

ERROR, to Muscatine District Court.

This was an action of assumpsit, commenced by the defendants in error against the plaintiffs, Nicholas Temple and Henry Funk. The summons was served upon Funk only, and the declaration subsequently filed excluded Temple as a party; but judgment by default was rendered against both of them.

S. Whicher, for the plaintiff in error.

R. P. Lowe, for the defendant.

Opinion by HASTINGS, C. J. It appears by the record and proceedings in this case, that Nicholas Temple, one of the defendants below, was not served with summons or other process.

It also appears that ten days did not elapse, between the date of the service of summons upon Henry Funk, and the return day.

The second section of the statute regulating practice, (*Rev. Stat.* p. 468,) provides that "it shall be the duty of the sheriff, or coroner, to serve all process of summons or capias, when it shall be practicable, ten days before the return day thereof," &c.

The summons was served on the 10th day of June, and the 20th day of June was the return day. To make this service ten days before the return day, it will be necessary to include the day of service; and the question presented by the assignment of errors is, ought that day to be so included? As the law knows no fraction of a day, (11 Mass. 204,) the day of service must be included in the computation. Not to compute that day would require service of more than ten days, which would violate the rights of the plaintiff, and the numerous decisions on the subject of computing time. They seem to establish a rule of computation in favor of the

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plaintiff in the process, that the day on which the act was done, as the service of process, should be included.¹ 3 Halst. 303; 15 Mass. 193.

Time is to be calculated one day inclusive, and the other exclusive. *Hoffman v. Duel*, 5 John. 232; *Pallard v. Yoder*, 2 A. K. Mars. 264; *Day v. Hall*, 7 Halst. 203; 10 Wend. 422; 3 Cowen, 19. If the legislature had intended that the defendant should have a service of ten full days before the return day, it should have been so stated. The day of the service will therefore be included, and there is no error as averred, in that particular.

But the judgment in this case was rendered against Temple, who was not served with process, and who was not a defendant in the declaration; the judgment, therefore, of the district court will be reversed, and case remanded.

Judgment reversed.

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MASON v. LEWIS et al.

Where a verdict cannot be legally warranted by the evidence, without setting it aside; or where the pleadings are so defective as to justify an arrest of judgment, the court may order the plaintiff to be nonsuited; but not where there is even doubt as to sufficiency of evidence.

When a nonsuit is either voluntary or ordered by the court, the plaintiff may recommence his action.

The plaintiff having the right of property and of immediate possession, he may maintain the action of trespass for a direct injury upon the estate, though not in actual possession.

ERROR, to Linn District Court.

P. Smith, for the plaintiff in error. The court cannot compel the plaintiff to submit to a nonsuit, after the evidence

¹ See *Diltz v. Zeigler*, ante, 164.

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has gone to the jury. 1 Peters, 471, 476; *People v. Brown*, 3 Gilman, 88; *Amos v. Sinnott*, 4 Scam. 447; *Booe v. Davis*, 5 Blackf. 115.

The court erred in deciding that trespass and not case was the proper remedy. The bill of exceptions shows affirmatively that the plaintiff had title, and that he never had possession. Trespass is an injury to the possession, and this possession must be immediate, at the time of the injury. 2 Phillips' Ev. 184; 3 Starkie's Ev. 1435. Proof of title is not sufficient; 1 Lord Raymond, 367; and especially when there is an adverse possession. *Van Brunt v. Schenck*, 11 John. 385; 4 Day, (Conn.) 306; 6 Mass. 513, 592; 9 John. 61; 11 ib. 567; 12 ib. 183; 17 Mass. 299. The court will please keep in mind that the bill of exceptions shows that plaintiff was not, and never had been in possession.

Case is the only proper remedy where plaintiff is out of possession. The plaintiff by his purchase acquired title to the crops, fences, and everything growing upon the land; and can maintain an action on the case for a tortious conversion of such fences or crops. In *Boyer v. Williams*, 5 Miss. 335, trover, which is a species of action on the case, was maintained for converting wheat under such circumstances. Why then deny the remedy for converting the rails taken out of the fence? The rails in the fence became the property of the plaintiff by the entry, and so did the wheat. *Rasor v. Qualls*, 4 Blackf. 286.

If the plaintiff had been in possession, he would have had his election to bring either trespass or case, as the injury in carrying off the rails would have been by force, and the damage done by exposing the crops would have been consequential. In all such cases the plaintiff will not be driven to bring two actions, but he can make his election to bring either *trespass* or *case*. *McAllister v. Hammond*, 6 Cowen, 342.

This principle is carried so far in many of the books, as to permit the plaintiff to waive the tort altogether, and sue in

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assumpsit. And I think that to lay down so stringent a rule as is here sought to be established by defendant, to govern proceedings before a justice of the peace, would be subversive of the ends of justice, and an innovation upon the common law, requiring more nicety and technicality before such courts than has ever been observed in courts of record.

W. G. Woodward, for the defendant. To the first assignment of errors the defendant says, that when the decision of the court is upon the ground that the action is wrongly brought, *e. g.* case for trespass, it being a question of law, the court can order judgment "as in case of nonsuit."

In what other manner can such a matter be disposed of? Go to the jury, merely for the court to instruct them that the action is wrong! It is not like the case where the evidence may be doubtful.

As to the second assignment, I cite our early reading. 1 Chit. Pl. 143 and seq.

Under our law relative to land-office certificates, I suppose the purchaser is legally in possession. "Quoad hoc," the certificate stands in the place of the patent or title deed.

Opinion by GREENE, J. This was an action on the case, commenced before a justice of the peace, for removing a quantity of rails, and exposing the crops of the plaintiff. Judgment having been rendered against the defendants, the cause was appealed to the district court, where, upon their motion, a judgment of nonsuit was rendered, upon the ground that the action should have been trespass instead of case.

One of the errors assigned is, that the court nonsuited the plaintiff against his consent. In support of this position, authorities are cited to show that a court cannot compel a plaintiff to submit to a nonsuit after the evidence has gone to the jury. This rule appears to be sanctioned by the courts in some of the states, and they authorize a plaintiff, if he chooses, to insist upon a verdict. But a different rule has been recognized by this court, and the practice of the New

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York courts adopted in this particular, so far as it can be done without encroaching upon the province of the jury.

The doctrine established by the courts of New York is, that if, in the opinion of the court, the testimony offered does not support the action, or is so insufficient as to justify an arrest of judgment, it has a right to nonsuit the plaintiff. 12 John. 299; 13 ib. 335; 1 Wend. 376. There appears to be good reason for this rule. If the evidence would not authorize a verdict for the plaintiff; or if so found the court would set it aside as contrary to evidence; or if the pleadings are so defective as to justify an arrest of judgment, why allow the case to go to a jury for their verdict? But in nonsuiting a plaintiff, great caution should be exercised by the courts to guard against an interference with the province of the jury. It should not be done if there is room for doubt as to sufficiency of evidence. The plaintiff, by suffering a nonsuit, retains the advantage of bringing another action, and this he can doubtless do when the nonsuit is ordered by the court. 14 John. 340; 1 Paine & Duer's Pract. 541; 2 Tidds' Pract. 917; 2 Dunlap's Pract. 652-3.

In the case of *Perley v. Little*, 3 Greenl. 97, it is laid down, that when the evidence offered by the plaintiff, and not controverted by the defendant, is deemed insufficient to maintain the action, the court may order a nonsuit; and that this is no infringement of the right of trial by jury.

As there appears to be good sense and great convenience in this practice, we believe it should prevail in our courts.

It is also urged, that the court erred in deciding that trespass and not case was the proper remedy. The bill of exceptions shows that the plaintiff had title to the land, at the time the injury was committed, by purchase from the government. This purchase placed him at least in constructive possession. Such a possession is sufficient to maintain the action of trespass. 3 McCord, 422; 7 Conn. 233. In the case of *Poole v. Mitchell*, 1 Hill, S. C. 404, it is held, that when the plaintiff has the right of property, and also the right of immediate possession, he may maintain trespass, although the

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actual possession is in another. A similar doctrine is asserted in 1 Stew. 229 ; 1 Wend. 466 ; 1 Verm. 485.

The position assumed, that the plaintiff was not in position to maintain the action of trespass, we think is not tenable, nor sustained by the facts set forth in the bill of exceptions. The injury alleged was direct, and not consequential. The act complained of working an *immediate* injury upon the plaintiff's estate, trespass and not case must be regarded as the proper remedy, and the court therefore did not err in ordering a nonsuit.

Judgment affirmed.

 PHILLIPS *et al.* v. TOWN OF BLOOMINGTON.

Where the requirements and conditions of a lease to keep a ferry have been violated by the lessee, a court of equity may declare the same to be forfeited.

Where the conditions of a lease require the lessee to establish and keep a good and sufficient steam ferry-boat, for the safe conveyance of passengers and their property, at all usual and reasonable times without delay, unavoidable accidents excepted ; it was held, that testimony of frequent application of persons for passage across the river, and the refusal of the lessee for hours to notice them, and of the departure of such persons to other ferries, &c., is admissible to prove a forfeiture of the conditions of the lease. It was also held, that the lessee having green wood, and being moored on the opposite side of the river, afforded no excuse for such delay ; that it was his duty, under the lease, to provide himself with the boat and the means of propelling, in order to ferry promptly from and to the Iowa shore ; and it was also held to be admissible to prove the boat to be unseaworthy and unfit for the business, by an authorized surveyor of hulls, or by any competent witness, in order to show a failure to comply with the conditions of the lease.

The general assembly has the power to confer the exclusive privilege upon individuals or towns, to maintain and keep ferries on the Mississippi river.

IN EQUITY. *Appeal from Muscatine District Court.*

This was a bill in chancery, filed by "The President and Trustees of the Town of Bloomington," against John Phil-

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lips and Francis J. Clark, to vacate a ferry lease, and enjoin the lessees from the franchise. The relief sought, and the proceedings in the case, are sufficiently set forth in the opinion of the court. The cause came up in the court below on the bill, the answer of Phillips, exhibits and depositions. Decree for the complainants; the lease declared forfeited, and John Phillips forever enjoined from all control, management, and interest in the ferry.

Stephen Whicher, for the appellant.

William G. Woodward, for the town of Bloomington.

Opinion by HASTINGS, C. J. By an act of the legislature of the territory of Iowa, approved December 29th, A. D. 1840, entitled, an act to amend an act entitled an act to incorporate the town of Bloomington, the complainants and their successors in office were authorized to establish and keep a ferry across the Mississippi river at Bloomington, in Muscatine county, and for one mile above and one mile below said town, to the east bank of said river, and were authorized to lease the said ferry for any term of years not exceeding ten years. In the year 1841, it appears that the complainants leased the ferry to one Francis J. Clark, one of the defendants, in which lease it was among other things provided that the said Clark should, on or before the first day of April then next, or as soon thereafter as the state of said river would allow, establish, and from thence afterward, during the said term of ten years, continue established and keep a good and sufficient steam ferry-boat at the place aforesaid, for the safe conveyance of passengers and their property across the said river, at all usual and reasonable times, without delay; unavoidable accidents, &c., excepted.

It appears that the said defendant, Clark, assigned the lease to John Phillips, whose misuse of the privileges granted, and failure to comply with the terms of the lease, are the grievances complained of in the bill.

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The right of a court of equity to cancel such a lease, for a failure to comply with its terms, we think, cannot be reasonably doubted. And the first question presented is, whether there has been a failure, on the part of the lessees, to substantially comply with the requisitions of the lease.

The testimony of several witnesses clearly shows, we think, an unquestionable delay on the part of Phillips, in the transportation of persons and their property, if not, in some instances, an absolute refusal.

Such is the testimony of Thomson and Fry, whose local position gave them an opportunity to know of such delays, the one keeping a wharf-boat at the ferry landing, and the other a tavern near the same; and testimony of other witnesses tends to show instances of delay. An objection is urged to the legality of the testimony of Thomson, Fry, and others, because the names of the persons desiring to cross were not given, and that their testimony is but hearsay evidence.

The witnesses do not testify to the declarations of third persons, except the declarations made at the time, and as a part of the application of such persons to cross the river. It is unquestionably competent for a witness to state the facts which may have come under his cognizance, such as the frequent application of persons for passage across the river, and the refusal of the defendant for hours to notice such applications, and the departure of such persons for other ferries.

The defendants, we think, have not succeeded in rebutting the testimony above referred to. Because several persons never witnessed the delays testified to by complainant's witnesses, raises no presumption against the facts to which they testify. The fact that defendant's wood was green, and that his boat was moored on the Illinois shore, is no excuse for delays in ferrying from the Iowa shore.

It was his duty to ferry from and to this shore promptly and without delay, and to provide himself with a boat and the means of propelling her, to enable him to do so. The franchise was granted by the Iowa authorities, and created within their jurisdiction.

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The evidence of Hedges is objected to, on the ground that the inspection of the ferry-boat was not in the port of St. Louis, nor was she a boat coming within the port jurisdiction of St. Louis. It is unnecessary to examine the act of Congress requiring an inspection of boats and vessels propelled by steam, as we think it immaterial whether the boat was proved unseaworthy by an officer of the government, or by any other competent witnesses.

The testimony of Hedges shows that the boat was unfit for the purposes of ferrying persons and their property, and then required extensive repairs, and the defendants have not proved that the boat was repaired; therefore, from this testimony, we are forced to the conclusion that the terms of the lease were violated.

A question is here raised as to the right of the legislature to confer upon an individual an exclusive privilege to keep a ferry across the Mississippi river, for the reason that this river, by the ordinance of 1787, was declared to be forever free, and a public highway. This question has been so often settled by the courts of Ohio, Kentucky, and Illinois, and by the supreme court of the territory of Iowa, that it would seem to be unnecessary for this court to enter into any lengthy discussion in favor of this right. But the question having been raised, we will reiterate what we believe to be the uniform current of decisions, when and wherever it has been raised in judicial tribunals.

The demands of public convenience, in the transportation of persons and their property over the country, by erecting the various highways, bridges, and ferries, it will be conceded, will subject to the public easement private property, upon just and adequate compensation. It is not in the power of the citizen to resist the demands of the public accommodation. The rights of the public are sovereign, and are only limited by the constitution requiring compensation, in all cases where private property is appropriated to public uses. In the case of *United States, ex re. Geo. W. Jones v. Fanning*, Mason, Chief Justice, in delivering the opinion of the court, says,

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"The right to construct a road, includes the power to provide for overcoming all obstacles in its course, as well those presented by a river, as by any other object. A ferry, properly so called, is merely the continuance of a road across a river. It is only a substitute for a bridge." Morris, 351. A ferry does not obstruct the navigation of the river; if it did, it would be clearly illegal.

In the case of *Mills v. The County of St. Clair*, 2 Gilman, 225, a case which was very elaborately argued, the court say: "That the legislatures of the several states possess the power within their limits, to establish and regulate ferries, is a principle which at this day cannot be successfully controverted, and that that power is sufficiently extensive, to authorize a grant for the construction of such ferry from the Illinois shore, on the waters of the Mississippi, in the manner prescribed by the act of the 2d of March, 1819, we do not entertain a doubt."

The grant of a ferry franchise necessarily implies a right to exercise exclusive privileges within prescribed limits and upon certain conditions; and a *ferry*, as ordinarily and legally understood, cannot exist without the property of exclusion of others in the exercise of the rights granted. In the case just referred to, the court upon the question say: "This principle is so well established that no authority need here be cited in its confirmation. Of all the numerous cases to which reference has been made upon the argument, not one has been produced which in any respect was counter to it."

In the case of *Francis B. Fay, et al., Petitioners, &c.* 15 Pick. 253, the court say: "The right to a ferry does not at all depend upon the right to or property in the waters over which it passes. The franchise of a ferry does not confer or enlarge, take away or impair, the right of navigation. It is a franchise conferring certain privileges and imposing certain duties, not affecting the right of navigation, but presupposing its existence." This case in Massachusetts is a similar case to the present, and involving many

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similar questions, and the court further say, "Ferries are as necessary over navigable waters as others, if the public accommodation requires them."

The legislature have conferred upon the corporate authorities of the town of Bloomington the right to establish and maintain a ferry opposite the town, making them the judges of the demands and wants of the public; and it appears that these authorities, to induce the defendants to establish a ferry, and afford a prompt and easy mode of transportation across the river, for a mere nominal consideration conferred upon the defendants an important trust, which has been abused, and the public interests disregarded.

The case of *Gibbons v. Ogden*, referred to by defendant's counsel, clearly asserts the right of the states to legislate on the subject of ferries, turnpike roads, inspection laws, quarantine laws, and health laws of every description, and does not conflict with the views we have expressed.

The decision therefore of the court below, cancelling the lease and decreeing a perpetual injunction against the defendant's use and enjoyment of the franchise granted thereby, is affirmed.

THE STATE v. MORSE.

An indictment for perjury under the statute is bad, which does not charge in the language of the act that the defendant "wilfully and corruptly deposed, affirmed, or declared, matter to be fact, knowing the same to be false, or denied matter to be fact, knowing the same to be true."

If an indictment does not substantially follow the language of the statute, it does not clearly charge an indictable offence, and is consequently not cured by that section of the statute which provides that "no indictment shall be quashed if an indictable offence is clearly charged therein."

ERROR, to Johnson District Court.

Indictment for perjury, framed in the usual form, but

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omitting to charge the perjury in the language of the statute. It alleges that Morse "falsely, maliciously, wilfully, wickedly, and corruptly, and by his own proper act and consent upon his said oath, did depose and swear in writing," &c. The indictment then sets forth the defendant's plea, in an action of assumpsit against him on a promissory note, and in which plea, verified by his oath, he denies his signature to the note. After setting forth the plea and affidavit, the indictment charges "that in truth and in fact the said *Edwin R. Morse* did execute the said due-bill mentioned in the said affidavit, attached and appended to the said plea as aforesaid," &c.; but the scienter is not given in the language of the statute, that he "wilfully and corruptly deposed, affirmed, or declared any matter to be fact, knowing the same to be false, or denied any matter to be fact, knowing the same to be true." On demurrer the indictment was adjudged insufficient.

H. D. Downey, prosecuting attorney, for the state. For the plaintiff in error it is contended that the court below erred in rendering judgment for the defendant. The allegation that the defendant knew that to be true which he denied to be fact, does substantially appear in the indictment. The court will, on examination of the indictment, find the allegation of knowledge on the part of defendant that he did execute the due-bill—the denial under oath of the execution of which bill caused him to be indicted—contained in the words following: "And then and there the said Morse *devising* and wickedly intending to cause and produce a judgment to pass against Webster, and in favor of himself upon the trial of said action of assumpsit, did on that behalf falsely, maliciously, wilfully, wickedly, and corruptly, and by his own proper act and consent upon his said oath, depose as follows," &c., (denying absolutely the execution of the due-bill.) This language amounts in *substance* to a positive assertion that the defendant knew the fact that he had executed the due-bill to be true, and,

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knowing that fact, denied it. It negatives, in as strong terms as it is possible to employ, the fact that he made the denial under oath, ignorantly, innocently, or recklessly. It attributes to the defendant a strong and corrupt motive, to wit: "devising and wickedly intending to cause a judgment to pass in his favor." Did he make the oath ignorantly or recklessly? Why, then, charge him with a corrupt motive? He could not, unless he knew that to be a fact which he swore was not a fact, have been influenced in the slightest degree by the motive charged upon him in the language just quoted. The defendant either knew or did not know that he had executed the due-bill. If he knew it, then how express that fact in language more potent than that he, when sued on the due-bill, wickedly intending to cause a judgment to pass against the payee thereof, and in favor of himself, the maker, upon the trial, did in that behalf falsely, wilfully, and corruptly, and by his own proper act and consent, deny the fact under oath. If he did not know that he had executed the bill, why charge him with such a motive for denying a fact of which he was ignorant? Ignorance of the fact confesses the entire absence of a motive. Recklessness would import anything but a supremely selfish motive, such as the above language attributes to the defendant. The whole clause quoted is absurd, if it conveys any other idea than that the defendant knowingly took a false oath. No language could more strongly negative the idea of innocence, ignorance, or carelessness than that employed in the indictment. Doubtless there are cases where a man may ignorantly swear to a certain state of facts with a corrupt intention. But is this such a case? To say that the defendant could deny his own signature to a bill upon which suit was brought against him, through pure ignorance or carelessness, and at the same time be impelled by such a motive as the one attributed to him, is such a contradiction as amounts to an absurdity.

For the plaintiff, therefore, it is contended that the guilty knowledge by the defendant is substantially alleged, and

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that the language used in the indictment for that purpose is as plain, strong, and distinct, as if the very words of the statute had been employed.

Again: it is contended for the plaintiff that the court erred in not sustaining the indictment, because the laws of Iowa do not require more than the substance of the crime of perjury to be stated in an indictment. If this court is satisfied that the crime has been substantially alleged, then the decision of the case presents no difficulties. In the *Rev. Stat.* p. 171, §32, the following enactment occurs: "In every indictment for perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, &c." Here the court will perceive that indictments for perjury need only allege the substance of the offence, without the usual formalities required in relation to other offences. A full review of the indictment, we think, cannot fail to satisfy the court that everything necessary to constitute the crime of perjury has been amply and substantially alleged in this case.

It is further contended for the plaintiff, that the decision of the court below violated the spirit and intention of the following enactment, *Rev. Stat.* p. 153, §46: "No indictment shall be quashed if an indictable offence is clearly charged therein, or if the charge be so explicitly set forth that judgment can be rendered thereon."

Gilman Folsom and *C. Bates*, for the defendant. What is perjury under the statute of Iowa? The 30th section of an act defining crimes and punishments, answers this question. That section provides, "that if any person, on his or her oath or affirmation, in any action, plea," &c., "shall wilfully and corruptly depose, affirm, or declare any matter to be fact, knowing the same to be false, or shall in like manner deny any matter to be fact, knowing the same to be true; every person so offending shall be deemed guilty of perjury," &c. *Rev. Stat.* p. 171.

Under this statute, the *scienter* constitutes the very gist

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of the offence. Without this knowledge of the falsity of that to which he swore, though every word of his evidence were false in fact, he is not guilty of perjury under the above law defining what is perjury. Many authorities can be cited showing that indictments must exactly pursue the language of the law creating the offence. 2 Chit. C. L. 315-316; Arch. C. Pl. and Ev. 541; 1 Chit. C. L. 241, and note (B.) But we need not cite authorities to show, that the exact words of the statute creating the crime should be used; it is sufficient for our present purpose, if we can show that the statute creating the crime must be substantially followed. Reason, in the absence of all authority, it would seem, ought to be sufficient to establish this point. But it is believed, that all of the authorities on this point are in favor of the position we assume. 6 American C. L. 35, (5); Ohio Cond. R. 838; 4 Bacon's Ab. 328; 8 Ohio R. 111, and the authorities cited on the other point, which also are good authority on this. In the case of *Rex v. Young*, 1 Russel, 391, and in *U. S. v. Keen*, 5 Mason, 453, it was held, that an indictment at common law, for aiding a prisoner's escape, should state, that the party knew of his offence.

In *Gatewood v. The State*, 4 Ham. 386, it was held, that an indictment for stealing bank bills, must aver that the defendant knew the bills to be bank bills, or the indictment would be bad. These authorities show, that where the scienter is a material ingredient in the crime, it must either at common law or under the statute, be expressly averred, or the indictment is bad. The statute of Ohio, under which the above decision was had, makes the scienter a part of the description of the offence, and therefore it must be averred in the indictment. In order to make the stealing of bank bills, stealing within the meaning of the statute of Ohio, the defendant must have known that they were bank bills. So in Iowa, as to perjury, the defendant must have known that what he swore to was false, or else it is not perjury, though he swore falsely.

Our statute, in defining perjury, has changed the common

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law, and therefore an indictment after the forms under the common law, would not be good.

Our statute very wisely and humanely protects a man who may swear falsely through surprise, inadvertency, or by mistake, from being guilty of the crime of perjury.

The reason given in the books, why no other words should be substituted for those employed in constituting the specific offence, is, "because no other words are exactly descriptive of the offence." In addition to the authorities above, see to the same points, 1 Chit. C. L. 282, and notes (B) and (X); 6 Mis. 263; 8 Mass. 65; 2 Pick. 141; 2 Mass. 130; 1 Bailey, 144; 6 Serg. and Rawle, 5; 1 Gall. C. C. R. 437; 2 Marsh. 364.

"Perjury, at common law, is defined to be a wilful false oath, by one who, being lawfully required to depose the truth in a judicial proceeding, swears absolutely, in a matter material to the point in question, whether he be believed or not." The scienter is not embraced within this definition, though most of the forms, if not all, in Archbold and Chitty, aver that defendant "well knew" the contrary of what he swore. 2 Chit. C. L. 319. Under this definition, "the oath must be false,"—not in fact, as it would seem, but in intention; for if the defendant, intending to deceive, assert of his own knowledge that which may be true, without any knowledge of the fact, he is equally criminal, and the accidental truth of his evidence will not excuse him. But under our law it would be otherwise. He must know that what he swears is false. Our law does not punish a man for maliciously, wilfully, and corruptly telling the truth, though it be with the intent to deceive. He must know that what he states as true, is in fact false, or it is not perjury.

But it is contended by the plaintiff, that the words in the indictment are in substance the same as the words used in the law describing the crime. Is this position tenable? Defendant contends that it is not. Because, first, there is no word singly, nor words collectively, in the whole indictment, whose technical, or common meaning, is synonymous with

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these words in the law, "knowing the same to be false." The least difference between the meaning of the words of the indictment, and those in the law describing—creating the crime, would make the charge in the indictment different from the crime as known to the law, and would therefore be matter of substance, and vitiate the indictment. Defendant could have made the affidavit, "devising and wickedly intending to cause and procure a judgment to pass against Webster," and still not have known that what he swore was false. He may have believed that what he swore was true, but in this he might have been mistaken. A man, after a lapse of years, may have really forgotten a small transaction of this kind. Again, a man might, with all the motives and intentions alleged against this defendant, seek to accomplish a particular result by testifying to the truth. A person knowing a particular fact, may have a deadly hatred against a party to a suit, and may, with all the motives, intentions, and feelings stated in the indictment, volunteer as a witness for the express purpose of gratifying his malice, and testify to such fact, and thereby procure a judgment to pass against his enemy. It is unnecessary to take up each word separately which is relied upon by plaintiff, as making up an averment of knowledge, as every word, except one, "falsely," has no other legitimate meaning than to express the feelings, motives, and intentions of the defendant, all of which may have existed consistently with the hypothesis of the defendant's want of knowledge—in fact, they express no such idea or meaning as knowledge. The word "falsely," certainly does not show that the defendant denied a fact, knowing it to be true.

But, secondly, all of these words precede the allegation of perjury, and seem to have been introduced rather as inducement, than as part of the charge of perjury; but if they properly constitute a part of the charge of perjury, still it is believed that they are perfectly harmless, without some other words importing knowledge of the defendant, as to the falsity of what he swore. It is not claimed by the plaintiff that

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there are any words, after the copy of the plea and affidavit, that amount to an averment of knowledge ; so it is unnecessary to say anything further as to them.

What would be alleging in the indictment the substance of the statutory offence? It would be employing words whose appropriate meaning is substantially the same. But the words here used have no similarity in meaning with those of the statute, and therefore the plaintiff's pretended averment of knowledge is entirely inferential, if at all. It is confidently asserted, that no rule of law or authority can be found, sanctioning inferential averments, and much less will they authorize a crime, particularly defined by statute, to be changed, or in part substituted, in indictments, by inference.

Opinion by HASTINGS, C. J. The omission in the indictment to charge, in the language of the statute, that the defendant deposed, affirmed, or declared some matter to be fact, knowing the same to be false, or denied some matter to be fact, knowing the same to be true, is a substantial defect, and is not cured by any statute. The statute referred to by the prosecuting attorney, providing that "no indictment shall be quashed if an indictable offence is clearly charged therein, or if the charge be so explicitly set forth that judgment can be rendered thereon," does not cure the defect, for the reason that no indictable offence is set forth in the indictment according to statute.

Judgment affirmed.

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A court of equity will not impart force to a defective title, when by doing so, other persons having a prior equity in the land would be injuriously affected. A contract to sell land will not be enforced if made by an agent invested with

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merely verbal and limited authority, to show the land and state the price; with the avowed understanding that his arrangements or bargains to sell, should be subject to the approval or disapproval of his principal; and he refused to confirm the sale.

Declarations by an agent of limited powers, not made at the time nor respecting the subject matter in controversy, cannot bind the principal, especially where those declarations were of a vague, indefinite character, and in conflict with testimony of a higher and more direct character.

A contract should be just, reasonable, and founded upon a consideration nearly adequate, in order to justify an enforcement by a court of equity.

Where an agent makes a contract in his own name, he cannot, after his principal refuses to ratify it, make him responsible by changing the contract, in signing his name as principal and his own as agent.

IN EQUITY. Appeal from Muscatine District Court.

Wm. G. Woodward, for the appellant. *First.* It is said that these lands were under contract of sale by title bond, to D. R. and A. O. Warfield. In answer to this, we refer to the following facts: 1. These lands were advertised for sale in Nov., 1841, in a list of land, particularly describing them. Whether through mistake, or to urge the purchasers to payment, we care not. The only fact we have to do with is, that they were advertised.

2. They were contained in the list given by Barrett to Stuart, of lands to be sold.

3. Mr. Starr, one of the attorneys with full powers, offered to sell some of these same lands to Robert Davis, a little after the sale of Stuart to Lucas, and Davis would have bought them, had they not just been sold to Lucas.

4. The Warfields considered and supposed their contracts at an end, on account of the above mentioned advertisement of them for sale, and the other circumstances; and we hold that the above facts do constitute a disaffirmance of the sale to the Warfields, and were so "*de facto*."

Second. The next subject of defence is the statute of frauds, and the form of the instrument; they holding that it is, in its tenor only, the private contract of Stuart. 1. As to the statute of frauds, the proper attachment to the bill is the contract, and so is in writing. 2. The form of the con-

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tract. It shows upon its face that the land is Barrett's, for the deed is to come from him. Barrett admits throughout that Stuart was his agent, but only pretends he exceeded his authority. B. admits the contract was made by Stuart for him, and gives his reasons why he will not comply with it. These things show clearly enough that the contract was not made by Stuart as his, but as agent for Barrett, and that B. has all along so regarded it. Who then can doubt that it is B.'s contract, if made within the authority of the agent. He was held out to the world as Barrett's general agent, and this gave him, of course, all the usual means of making and effecting the contract—of carrying out the objects of the agency.

See Story on Agency, 58, 59, 60, 73, 79, 87, 91. On page 70, he says: "But by far the most numerous cases of agency arise, not from formal or informal written instruments, but from verbal authorization, or from implication, from the particular business or employment of the principal or agent," &c. "In all such cases, whether the agency be of a special or of a general nature, it may also be laid down as a universal principle, that it includes, unless the inference is expressly excluded by other circumstances, all the usual modes and means of accomplishing the objects and ends of the agency. And even a deviation by the agent from the appropriate course, will not vitiate his act, if it be immaterial or circumstantial only, and does not in substance exceed his right and duty."

This is an exact description of the present case. Stuart, being the agent, was possessed of the proper authority as to mode or means. Other passages in the same writer, (see the pages quoted above,) carry the idea that an agency carries with it the power to do all things required by the law, or the usages of trade, &c., to effect his objects.

Thus, Stuart was empowered to make a written instrument, to make the contract good within the statute.

But it has been argued, this instrument is not sufficient, it

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is too informal, it does not express itself to be in the name of the principal.

The principle is somewhere held and set forth, that this strictness of form is not to be rigidly exacted, except in those cases in which the law demands the observance of a particular form. And further, it is correct law, that a court of equity does not require the same strictness of form which a court of law claims. Equity seeks the substance, and not the shadow.

For similar ideas, see Story on Agency, pp. 77, 143-145, 150-152. On p. 141, after speaking of deeds and other sealed instruments, he says, "But when an act is to be done *in pais*, or in any other manner than by a written instrument under seal, then the act will be so construed, if it may be, as most effectually to accomplish the end required by the principal."

James P. Carleton, for respondent. Argument submitted prior to his election to the office of district judge.

The counsel for the appellant is mistaken if he supposes that it will be contended that private instructions are to control a general agency. No such doctrine will be advocated. But it is insisted, that the establishment of a general agency upon the part of Stuart, will not entitle the appellant to a decree, upon the instrument set forth in his bill. It is admitted, that there are numerous cases in which equity will aid the defective execution of a power—that it does not look so much to the *form* as to the *substance*; but in all such cases, it must clearly appear from the writing, that the party intended to execute the power. See 1 Story's Equity, 185, § 172. Admitting, for the sake of the argument, that Stuart was the general agent of Barrett for the sale of those lands; in that capacity he had the *power* to bind him by a contract reduced to writing, and properly framed, or even defectively executed, provided the writing on its face showed an intention to execute his power in making a contract binding upon him. To possess a power, and to exercise it, are

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two different things, and a court of equity will not infer its exercise, though the right be proved, unless the instrument itself clearly shows it. Nor will it allow oral testimony to be introduced to establish the fact. The reason: the instrument showing that he acted individually, and not in the exercise of a power granted to him, to allow oral testimony to be introduced would be to vary the written instrument. Upon this point, courts of equity are as tenacious as courts of law. To apply these principles to the instrument before the court. Does it show upon its face, an intention upon the part of Stuart to execute the power given to him by his agency, so as to bind Barrett? Does he represent himself anywhere in it as agent? Does he attempt to bind Barrett to do an act? He represents himself as receiving the money in full pay for certain lands,—that he (Stuart) is to procure a good and sufficient deed, from Richard F. Barrett to Joseph Lucas of Ohio, to be made, &c. ; nothing said of agency, or of Barrett being bound to make a deed. But in order to present this matter in a still stronger light, (and it is the true light in which to view it,) take the instrument, unconnected with any testimony, going to establish an agency, and would the court infer from the face of the instrument, that Stuart was an agent, or that by the instrument itself he intended to execute a power? The only fair construction that could be placed upon it would be, that Stuart was acting for Lucas in purchasing the land from Barrett. The mistake of the appellant consists in this; he supposes that by establishing a general agency upon the part of Stuart, it must necessarily follow that the instrument in question must be binding upon Barrett, forgetting that he is bound to go a step further and prove that Stuart, in the execution of the writing, intended to exercise his *power* of agency. To do this, parole testimony must be introduced, because the instrument itself shows no such intention. This cannot be done, for the reason that it violates a principle recognized both by courts of law and equity,—to wit, a written instrument cannot be contradicted by oral testimony.

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This court will not allow a party to come in and by parole testimony make that the contract of one, which, on its face, bears no marks of being his. Again, is this instrument defective, or informal? If so, in what? It is signed by Stuart,—it binds Stuart,—the name of no other person sought to be bound is mentioned in such a way as to infer that Stuart is representing him. Why should not the court, taking the writing as their guide, as soon say that Stuart was the agent of Lucas as of Barrett?

But it is said, it appears upon the instrument that it is Barrett's land; therefore Stuart intended to bind him. This syllogism, tested by the rules of logic, would hardly be pronounced a sound one. At any rate, it would be no sounder than the following:—Stuart received the money of Lucas in pay of certain lands, and was to procure a deed from Barrett in ten days, therefore Stuart was the agent of Lucas. The court will discover too, from all the authorities introduced by the appellant, that it appeared from the face of the instrument itself, that the party signed his name as agent of his principal, evidently showing that he intended to execute his power. And perhaps the strongest authority cited by the appellant, is to be found in Story upon Agency, 152, § 162, in which the following language is used, "Indeed, it may be asserted as a general rule, that in all cases, when an agent has contracted within the sphere of his agency, and the principal is not bound by the *form* of the contract *at law*, a court of equity will enforce it against the principal, upon principles *ex æquo et bono*." This, standing alone, might appear to favor the position contended for by the appellant; but when it is taken in connection with preceding pages, as far back as page 136, together with the principle of equity before referred to in 1 Story's Equity, 185, § 172, it is believed it will be found that it is not the intention of the author to carry the principle (as to the enforcements of such contracts) any farther than what has been contended for by the appellee. Most, if not all of the instances cited by the author in the pages before referred to, are cases in which the instruments

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were informally executed, but in all it appeared from the face of the instrument itself, that the agent intended to execute his authority, and by his act to bind the principal. In all such cases, the only question for the court to determine is, whether the agent acted within the scope of his authority in making the contract. Parole testimony, (if it be in a case where an agent might be appointed verbally,) for establishing that fact, would not contradict the instrument. Indeed, the language of the quotation itself shows, that the author was referring to instruments informally executed, "and the principal is not bound by the *form* of the contract *at law*." There must be some basis laid for equity to take hold of the contract, and that must be in the writing. It is the intention of the parties upon which it operates, and that intention must be gathered from the face of the writing. If, therefore, it does not appear in the writing, that the party intended to bind his principal, no testimony can be received to establish that fact; because, in doing so, the court would, by oral testimony, make that the contract of one man, which, by writing, appears absolutely to be the contract of another. This cannot be done, either in law or equity. See 11 Mass. 27; 2 Story's Equity, 76, § 767.

But again, it is contended that this contract should not be specifically enforced, on the ground that it comes within the statute of frauds. The arguments in support of this position, are to be found under the second point made by the appellor in this case. To make it a contract binding upon Barrett, parole testimony must be introduced to show the intention of Stuart at the time he entered into the contract, and also the character in which he contracted. On its face, it is Stuart's contract absolutely. No court can infer anything else. To make it Barrett's contract, the instrument must be contradicted, and that too by oral testimony. In other words, a new contract must be made out by parole proof, which certainly contravenes the provisions of the statute of frauds. See 2 Story's Equity, 76, § 767. In connection with this we may observe, that parole testimony will not be received to prove

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that Stuart was an agent in opposition to the writing. See 11 and 12 Mass. before cited. This rule prevails also in equity. 2 Story's Eq. 76, † 767.

Again, this contract should not be enforced, on the ground that it would be inequitable. 1. Because there is an outstanding equity in favor of one of the Warfields. This land, the court will discover by the testimony, was sold to Warfield, 26th October, 1839, for six hundred and ninety-one dollars thirty-nine cents, payable in five years, in five equal annual instalments. If the said sums were not paid punctually, at the time and places specified, the said Barrett reserved to himself the right "to ratify or confirm this agreement or not." The sale was made to Lucas by Stuart, May 4th, 1842, before the expiration of the five years, and before any act upon the part of Barrett, showing his intention to rescind the contract. Warfield had an equity; unless the contract was disaffirmed. Suppose that Warfield, even after the advertisement, had tendered Barrett the amount of the purchase money, with interest, and demanded a deed, and Barrett had refused, would not a court of equity have compelled a specific performance? We think it would, and for this reason. Barrett was in possession of Warfield's notes,—Warfield, of his bond and land: no notice had been given him of his intention to rescind the contract by delivering up, or an offer to deliver up, the evidences of that contract. The presumption arising from these facts would be much stronger, that he did not intend to rescind, than the one arising from the advertisement that he did, and the court, acting upon this, would carry out the contract. Indeed, to view the advertisement in the strongest light, it could only be considered as manifesting an *inchoate* intention, which might or might not be perfected, according as Barrett did or did not deliver up the notes, and notify Warfield that the contract was at an end. Barrett could not bring his action to recover the possession of the property, without giving Warfield notice; and why? Because of the contract. Would the advertisement be considered as notice? Certainly not. And how then could it

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be considered as a disaffirmance of the contract; and this contract to this day, from aught that appears before the court, is unrescinded. The court never will lend its aid to carry out a contract defectively executed, when such aid would, under all the circumstances, be inequitable to other persons, or be repelled by a counter equity. See 1st vol. Story's Equity, 181, § 169.

2d. It is inequitable, because of inadequacy of price. There are two hundred and forty acres of land—cost, \$300; worth, according to testimony, \$4.50 per acre—making in all, \$1080. Lucas gave \$400 in Illinois bank paper, worth, according to the testimony of Issett, at that time, from 40 to 45 cents on the dollar, making \$180,—one hundred and twenty dollars less than the original cost, and nine hundred dollars, or six times less than the real value; and placing Illinois paper at its face, it is a little over two and a half times less than the real value. How far inadequacy of price, *per se*, is sufficient to prevent a specific performance, seems to be somewhat unsettled. Story, in his Commentaries on Equity, vol. 2, 79, § 769, says, "An agreement, to be entitled to be carried into specific performance, ought to be certain, fair, and just in all its parts." Chief Justice Savage, in the case of *Seymour v. Delaney*, 6 Cowen, 517, after examining some of the principal cases upon this point, states that the question, (that is, inadequacy of price being sufficient to prevent a decree for specific performance,) "is one upon which very great men have differed, and have administered the equity of the court upon diametrically opposite principles. The one class maintain that the court will not lend its aid to enforce the performance of contracts, unless they are fair, just and reasonable, and founded on *adequate consideration*. The other class maintain that unless the inadequacy of price is such as shocks the conscience, and amounts in itself to decisive and conclusive evidence of fraud in the transaction, it is not of itself a sufficient ground for refusing a specific performance." After mentioning many distinguished names that have taken sides upon this ques-

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tion, the chief justice himself decides in favor of those who maintain that the contract should be fair, just and reasonable, and founded on adequate consideration. And although in the final determination of the court, an opposite view was taken, and in favor of the inadequacy of price being such as shocks the conscience and amounts to conclusive evidence of fraud, yet from the review which is taken of the cases and the names given, it is evident that the weight of authority is in favor of the position occupied by the chief justice. But whichever view of the question this court may take, it cannot affect the position occupied by the appellee. For surely if there ever was a case in which the gross inadequacy of price would be evidence of fraud, it must be this. The price given is six times less than the value. The conscience of any indifferent man, however elastic it might be, would certainly be shocked at this inadequacy. But when this is taken in connection with the peculiar circumstances which surround this case, the reason for refusing a specific performance becomes still stronger. The fact that Barrett himself did not make the contract—the doubts which hang around the character and extent of the authority of Stuart, (if authority he had)—the character of the contract itself, being the individual contract of Stuart, and binding on him alone—the outstanding claim of the Warfields—the relation which the contracting parties on the one side sustained to the Warfields—the promise made by Mrs. Steinberger to Barrett, to purchase a portion of these lands at least, for the benefit of her son-in-law—these taken in connection with the gross inadequacy of price, certainly present sufficient reason for the decree of the court below, and sufficient to justify this court in affirming the same. The decreeing a specific performance is a matter of discretion with the court, and not of absolute right. Hence Story (2 Story's Equity, 79, § 76) says "it requires a much less strength of case to resist a bill to perform, than to enforce a specific performance. Courts of equity will not decree a specific performance in cases of fraud, or of *hard* and *unconscionable* bargains, or where the

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decree would produce *injustice*; and generally not in cases where it would be inequitable under all the circumstances." In view of all the circumstances connected with this case, there can be but one opinion, and that is, it would be grossly inequitable to compel Barrett to convey this land to Lucas. Lucas has lost nothing by the transaction. He never was in the possession of the land; his money was tendered back to him, according to the testimony of Stuart, and in pursuance to the contract, as he, Stuart, understood it, so that Lucas may be viewed as standing *in statu quo*. To decree a conveyance now, would be to take the land from Barrett, under, as he contends, an unauthorized act upon the part of Stuart, at one sixth of its real value, and under circumstances which induce a strong suspicion of collusion upon the part of those who seek to become the owners of the different tracts of land alluded to in the depositions.

There is one other point to which it may be necessary to refer the court more particularly, and which, it is believed, constitutes one of the strong points in the case.

The contract, it will not be contended, at the time of its execution, was either in law or equity binding upon Barrett. It had not then the appendage, "agent for Richard F. Barrett." On its face then it was the contract of Stuart, and if it proved any agency at all, it proved that Stuart was agent for Lucas. And although Stuart was in fact the agent of Barrett, and had the power to dispose of the lands mentioned in the bill, yet according to the law already referred to, parole testimony could not be introduced to show that fact. The instrument, without the *appendage*, shows no intention upon the part of Stuart to execute a power. Now it is admitted that if Stuart possessed the power of disposing of those lands, the contract might have been put in proper form, (if in the making of the contract he intended to act as agent,) prior to an express refusal upon the part of Barrett to carry out the contract, and that refusal being made known to the parties concerned. In this case, according to deposition of Lucas, page 14, and deposition of Stu-

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art, page 40, there was a refusal upon the part of Barrett to carry out the contract as signed by Stuart, and this fact was communicated to both Lucas and Stuart. This then was an express revocation of Stuart's agency, if agency he had, so far as this particular land was concerned; and the contract in the first place not being binding upon Barrett either in law or equity, after the refusal to ratify such a contract, Stuart had no right to turn around and make a contract binding upon Barrett, which he had expressly refused to sanction. His agency to make such a contract was at an end, so that the appending of "agent for R. F. Barrett," by Stuart, imparted no virtue to the contract. This view is supported by authorities cited above.

Opinion by GREENE, J. The bill in this case was filed by Lucas against Barrett. It states that in May, 1842, the defendant was seized in fee of certain lands, and had employed one R. Stuart to make bargains for the sale of the same; and who accordingly made an agreement with complainant to sell him the land in question, upon the terms and conditions stipulated in a written memorandum or receipt, of which the following is a copy:

"Received of Samuel Lucas four hundred and eighty dollars, in full pay for the north-west quarter and the west half of the north-east quarter of section two, township seventy-six north of range three, west of the fifth meridian. In consideration of the above-named sum I am to procure a good and sufficient deed from Richard F. Barrett, to Joseph Lucas of Ohio, to be made within ten days from this date.

ROBERT STUART,

May 4th, 1842.

Agent for Richard F. Barrett."

The bill alleges a peremptory refusal of defendant to make a deed for the land in accordance with the receipt; and concludes with the usual prayer for a decree of title to the premises.

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The answer, in substance, assumes, and places the defence upon, these grounds :

First. The land described in the bill had been previously sold to one Warfield, and did not belong to defendant ; that Stuart had no authority to sell it ; and that even if the land in question had been subject to sale by Stuart, he contracted it for less than the original, or required price, and in that acted without authority.

Second. Stuart sold subject to defendant's ratification ; which ratification had been uniformly refused.

Third. The receipt from Stuart was originally executed in his own name and individual capacity ; and after the defendant refused to ratify the sale, complainant induced Stuart to add to his own signature the words, " Agent for Richard F. Barrett : " and charging that the receipt is not the defendant's, and that he is not bound by any of its stipulations. In the district court the bill was dismissed, and a decree rendered for respondent.

1. As this case more appropriately turns upon other points, we shall but briefly notice the defence set up, on the strength of Warfield's outstanding equity. It appears that the land in question was sold to him in October, 1839, for \$691.39, payable in five equal annual instalments. In case of failure in payment, Barrett reserved to himself the right to ratify or revoke the agreement at pleasure. But Stuart agreed to sell the land to Lucas before the expiration of the five years, which was Warfield's time for payment, and before there was any act on the part of Barrett, showing his intention to rescind the contract, except by an advertisement in which the land appears to have been offered for sale by Barrett ; and that, it is claimed, was done inadvertently and through a mistake. If, as may well be inferred from the testimony, the contract with Warfield had not been disaffirmed, he unquestionably had an equity in the land, and might have secured title by payment of the purchase money. This contract appearing to have been in force at the time of the sale made by Stuart, we should in

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our decision be governed by the principle that a court of equity will not impart vitality and force to a defective contract, when, by doing so, other persons, having prior equity, would be injuriously affected.

The next position assumed by the respondent, that Stuart had no authority as agent to sell the land, involves the leading question in this case; and it is one upon which there is much conflicting testimony. But we find the answer too well sustained by corroborating proof to leave much doubt upon our mind, as to the nature of the agency. It was evidently of a very limited character, investing no authority to make absolute sales or conveyance of lands. He appears to have been empowered merely to show the lands, state prices, and leave the bargains and sales subject to the approval or disapproval of his principal; and even this authority was only given by verbal arrangement, Stuart having no power of attorney or other written instrument constituting him Barrett's agent, though he had received letters requesting him to sell lands, at stipulated prices, with the understanding that if the sale gave satisfaction the title would be conveyed by Barrett to the purchaser; and if not, the money would be refunded. In this instance, the transaction was unqualifiedly rejected, the money refused and ordered to be returned to Lucas. It appears too that Stuart informed Lucas and all with whom he did business for Barrett, of the limited agency or authority under which he acted. Though there is conflicting testimony in relation to these facts, still we can but regard them as established by a decided preponderance of legitimate proof. The plaintiff undertakes to show Stuart's agency from his declarations and the understanding of the neighborhood. But the declarations proved were of too vague and indefinite a character to have much bearing, especially against testimony of a higher and more direct nature. Nor were they the declarations of an agent, made under circumstances which could bind the principal. They do not appear to have been made respecting the subject matter in controversy, and at the

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time of the contract, constituting a part of the *res gestæ*: see Story on Agency, § 134 and 135.

To admit the declarations of an agent not made at the very time of the contract, and in relation to it, would be going beyond the known rules of evidence, and might result in great injustice. What one man says, not upon oath, can hardly be regarded as safe or reliable evidence against another; unless the former acts within the scope of authority as an agent, and what he says constitutes the agreement of the latter as principal. As the declarations of Stuart constituted no part of the contract in this case, we cannot consider them entitled to much weight as evidence. Nor do we regard the understanding of the neighborhood as sufficient to establish a general agency, especially when, as in this case, uncorroborated by direct proof, and unconfirmed by relative situation of parties, or by special circumstances and course of dealing, or by recognition.

To sustain the bill and justify a specific enforcement of the instrument made by Stuart, against Barrett, a general agency to sell his lands should be more clearly established in Stuart; or else it should definitely appear that he was authorized as special agent to sell the land in question. In either case the proof should show an agency with sufficient authority to make an absolute sale of the land; and also that the contract was made by the agent in the name of the principal: if otherwise, he cannot be regarded as legally and equitably liable. But the agency and transaction at bar fall far short of these rules; as appears by respondent's answer, the concurring evidence of the agent himself, and the testimony of Grimes, and Starr, and other witnesses, together with the peculiar nature of the contract. All these show conclusively that Stuart's agency was of a very limited character, extending no authority either general or special, direct or implied, to make an absolute sale of the land; and that his arrangements were all made subject to the avowed condition of his principal's recognition and approval.

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Again, it is contended for the respondent, that, even if the land had been subject to sale by Stuart, he contracted it for less than the required price, and in that acted without authority. The money received by Stuart was, it appears, Illinois paper, which at that time was not worth half its face; and besides, the land was sold for less than the stipulated price, even if the funds paid had been estimated at par value. The required price of the land was \$2.81 $\frac{1}{4}$ per acre—making the two hundred and forty acres amount to six hundred and seventy-five dollars. But Stuart's arrangement with Lucas required only four hundred dollars for the land, in Illinois bank paper; which in real value was less than two hundred dollars for property proved to have been worth over a thousand. This inadequacy of consideration throws an inequitable color upon the transaction, and gave Barrett just cause for the exercise of his reserved power of disaffirming the contract.

It can hardly be expected that a court of equity will lend its aid to enforce a performance, unless the contract appears fair, just, reasonable, and founded upon what may be regarded as near an adequate, or at least an honest consideration; *Seymour v. Delaney*, 6 Cowen, 517. Story, in his Commentaries on Equity, vol. 2, § 769, says, "An agreement, to be entitled to be carried into specific performance, ought to be fair, and just in all its parts. Courts of equity will not decree a specific performance in cases of fraud or mistake, or of hard and unconscionable bargains."

2. The fact has already been adverted to, that Stuart sold subject to the ratification of respondent. This was not only responsively averred in his answer, but distinctly sworn to by Stuart and other witnesses. It appears to have been admitted by Lucas to Barrett in St. Louis, when the former requested a ratification of the contract, which was refused. On this point Stuart testified as follows: "All the sales I made for him, I made supposing they would be subject to his ratification; some he ratified, and some he did not." He also testified that he made the limited nature of his au-

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thority known to Lucas at the time of the agreement; and agreed to furnish a deed only in the event that Barrett would affirm the sale. Upon this point there is strong corroborating testimony; while it is contradicted only by proof of very questionable relevancy and admissibility.

3. It is contended that the receipt or instrument, which the bill prays to have enforced against Barrett, was not executed by Stuart in the capacity of agent, but in his own name, and upon his own responsibility; and that after the refusal to ratify the sale, Lucas induced Stuart to add to his own name the words, "*Agent of Richard F. Barrett.*" This fact is well established by testimony. If the original contract was not made with Stuart as agent, but with him in his individual capacity only, the addition of "*Agent, &c.,*" after the respondent refused to ratify the sale, cannot change the character of the contract, nor divert the liability from Stuart to Barrett. Unquestionably the contract might have been put in proper form, if the agent possessed the power to sell the lands, and if in the contract it was understood and intended by the parties concerned that he should act as agent, in case it had been done prior to an express refusal on the part of the principal to carry out the contract. He having refused his sanction when the instrument showed no intention to execute a power, and having virtually revoked the agency—at least so far as that transaction was concerned—Stuart had not even a show of authority for disregarding the revocation, and attempting to make a contract binding upon Barrett, which was of force only against himself.

Viewing this case in all its bearings, we cannot do otherwise than affirm the decree of the district court.

Decree affirmed.

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MILLER v. MCGALLIGAN.

Where B. and M. filed a bill to foreclose a mortgage against J. M., and W. M. was made a party defendant by an amended bill, to which J. M. made no answer, but W. M. answered, and set up fraud in B. and M. in obtaining an assignment of the mortgage from him as the original mortgagee; it was held that on dismissing the bill as to B. and M., a decree of foreclosure could not be rendered in favor of W. M. against J. M., as he was not summoned to answer a bill describing such an interest, nor to respond to parties in the character of trustees; and that to justify such a decree, J. M. should have been made an adversary party to W. M., by motion or cross-bill.

IN EQUITY. *Error under territorial laws to Van Buren
District Court.*

The opinion sufficiently states the case to give a correct idea of the point decided.

J. C. Knapp, for the plaintiff in error. The court erred in rendering judgment against Miller, on a mere order of dismissal, as against Burns and McBride. *Rev. Stat.* p. 109, § 23, provides that if the complainant shall not answer the interrogatories exhibited by defendant within the time fixed by the rules of court, "his petition shall be dismissed." Then, whenever that circumstance occurs, the complainant is out of court. He cannot farther prosecute his claim in that case, because he has failed to comply with a requisition of the statute "within the time fixed by the rules of court." The court therefore does not, and cannot enter into an investigation of the merits of the case, but merely decides (not that the complainants have no rights, but) that the court cannot proceed to investigate the complainants' rights in consequence of their default. The judgment is therefore tantamount to a judgment of *non. pros.*, and does not preclude the complainants from prosecuting again for the same subject matter.

If any doubt can exist in this matter, it will receive support from other portions of the same act. Section 43 recognizes "decrees or dismissions," in two different places, as

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matters distinct in their character and application. Section 33 provides that if the complainant does not appear at the time and place of hearing, "his petition shall be dismissed, with costs," &c. No investigation takes place in that instance, but merely an order that the complainant shall not farther prosecute his suit in consequence of his default. Section 34 provides that if the defendant "shall not appear," an investigation shall take place, &c. The judgment therefore in the first case above named, could not be a bar to complainant in another suit for the same subject matter,—*a fortiori*, it could not conclude the defendants: and if it would not conclude them, it would be nugatory. See Story's Eq. Pl. § 793; Jeremy, Eq. Jur. 238; Cooper, Eq. Pl. 270, 271; *Peering v. Dunning*, 4 John. Ch. R. 140; *Neafie v. Neafie*, 7 ib. 1.

There are many cases where even a judgment upon demurrer, when all the allegations, correctly pleaded, are admitted by the demurrer, and when an investigation does take place, so far as those allegations are concerned, will not preclude the complainant from bringing another action for the same subject matter. Story's Eq. Pl. 358, § 456; 2 Mad. Ch. Pr. 248; *Holmes v. Remsen*, 7 John. Ch. R. 286.

It is clear, therefore, that if no investigation takes place upon the merits, and nothing substantial is determined concerning the rights of the complainants, no decree can be made which shall effect the respective rights of the co-defendants, even could the chancellor, under the broad dicta of the books, conferring almost unlimited authority upon him, proceed to the investigation of their respective rights after he had decreed that the complainants had no right to the subject of the suit. And it is also clear that no investigation could be had in this case, for on default of complainants as prescribed, "their petition shall be dismissed." Then *cessante causa, cessat effectus*.

2d. But if the complainants should be held concluded by the decree in the above case, we then submit that, notwithstanding the broad dicta of the elementary books before re-

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ferred to, the court should not have proceeded to decree respecting the relative rights of the co-defendants. See Fonb. Eq. 322, 4th Am. ed. note of Am. editor and authorities cited; Story's Eq. Pl. ch. iv. sec. 72, and authorities cited.

Courts of equity entertain suits for the investigation of mixed and complicated rights; and it is laid down as a general principle, that all persons interested in the subject of the suit must be made parties. And it has been remarked that the expression, "subject of the suit," may mean the question, as whether A. has a right to foreclosure in a particular case, or it may mean the property or interest respecting which litigation is engendered. See Story's Eq. Pl. 77, note, Col. on Part. 11. If it should mean the former, then it is necessary to bring before the court all persons who have a legal interest, or equitable interests not legally represented, so that the decree of the court upon the merits shall be binding as against the complainants in favor of all interested. It is necessary then to bring in all parties whose rights may be affected as above, so that the court, when it has the property or interest in its hands for disposition, may proceed at one time to make decree respecting all the interests involved. The question of parties in equity is said to be, in a great measure, one of policy to prevent multiplicity of suits, and to save re-investigation of the same matter many times. Consequently all persons having ostensible interests in the subject matter should be made parties.

Suppose then that A. should file a bill; claiming an interest in a certain subject matter. He is of course required to bring before the court all persons interested, according to the rule above stated. And suppose it should turn out on investigation that A. had no rights to the "subject of the suit," according to the second definition above, what could the court do? Could it with propriety say, "The whole amount of this contest has been to prevent A. from establishing an interest in the '*subject of the suit*,' and in that the defendants have been successful? And it is also true that the defendants have been dragged before the court, in all probability

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against their will, to contest this unjust claim, and it is highly probable that the defendants have no desire that the court adjudicate concerning their respective rights; nor are their respective rights in any way shown to the court. Still, because we find a broad dictum laid down by elementary writers upon the subject of parties in equity, that 'it is the constant aim of courts of equity to decide upon and settle the rights of all persons interested in the subject of the suit; (see Story's Eq. Pl. 74,) therefore we must '*decide upon*' that which has not been investigated, and '*settle*' that which has never been disturbed!" It is undoubtedly true that if A. should establish a claim to the property in contest, be it ever so unimportant, courts may, when deciding upon the extent of his rights, proceed to dole out to all other parties before them their respective portions, because in the first place, as a general thing, the same testimony which established the extent of A.'s claim, would also designate the respective rights of B., C., &c.; and 2d, from the motive of policy above named. But until it could be established that A. had rights to the subject matter, no testimony could with propriety be introduced to ascertain the respective rights of B., C., &c., as amongst themselves. The bill must be dismissed, because A. has not established the primary allegation of his bill, to wit, that he had rights; and as a consequence, the court could not take hold of the property to distribute it.

But should it be urged that Miller made default, and thereby tacitly admitted the justice of complainant's claim as against him, and as a consequence McGalligan finding the complainants (bill and all) out of court, without examination has a right to appropriate the matters alleged in their bill against Miller, to his own benefit, we answer, *non sequitur*. We think we have shown satisfactorily that the complainants are not precluded, by the order of dismissal in this case, from bringing another suit and having a farther investigation respecting the assignment of the bond and mortgage to them. But should it be otherwise, the statute, p. 108, sec. 13, provides that if the defendant does not file his

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plea, &c., within the time fixed by the rules of court, the court may proceed to decree thereon, or may compel the complainant to prove the allegations of his bill, &c. But the bill is out of court. The court cannot, if it would, make a decree upon the allegations of the bill, for it is not before them. Neither can proof be introduced to sustain its allegations, for the court has no right to look into it to see what is therein alleged. It is the bill of Burns and McBride, and by no *equitable* legerdemain can it become the bill of Wm. McGalligan. McGalligan, if he can sustain all the allegations set forth in his answer filed in this case, in another suit against Burns and McBride, may possibly obtain the aid of a court of chancery to enable him to control the bond and mortgage upon which this suit is founded, or their proceeds. Even that point has not as yet been investigated in this suit. If the court could make any such investigation, it must of course be under the provisions of section 13, above cited, and the language of section 23 positively precludes that. The court does not undertake to say whether the allegations of the defendant are true or false, nor does it even proceed to see what those allegations are. If the complainants do not *file* their answer to defendant's interrogatories within the time fixed by the rules of court, their bill is *dismissed*, without any investigation, and from that moment they and their bill are beyond the reach of the court, except for the purpose of compelling to pay costs for their default. Under no possible circumstances can McGalligan become entitled to claim "the bill" or the allegations therein set forth as against Miller, for his benefit. He has as much right to look into the private dormitories of Burns and McBride, as into their bill after it is dismissed, and it is believed that the same principle applies to this court.

One defendant cannot have a decree against a co-defendant without a cross-bill with proper prayer and process, or answer as in an original suit. *Tabbot v. McGee*, 4 Monroe, 379. A dismissal of a bill for want of prosecution does not pre-

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vent complainant from bringing another bill. 18 Vesey, Ch. R. 459.

J. C. Hall, for the defendant. The case shows that Burns and McBride held in trust for McGalligan, who sought a decree in their favor for his use. The decree duly declares the trust, and disposes of the case in accordance with the apparent equity of the parties. Miller, by his default, confesses his liability, and the decree only makes him pay to the person who appeared to be entitled to receive the amount due. Substantial justice has been done, and the defendant, Miller, can only complain as to the form, not the substance.

Opinion by Hastings, C. J. This was a proceeding in chancery in which the record shows that Burns and McBride filed their bill to foreclose a mortgage executed by Miller. That McGalligan was made a party defendant by an amended bill. That Miller demurred for want of parties, and thereby caused McGalligan to be made a party defendant, and never answered. That McGalligan answered, and set up fraud in complainants in procuring the assignment from McGalligan to Burns and McBride, McGalligan being the original mortgagee, and with his answer exhibited interrogatories to complainants under the statute, and the bill was dismissed according to the statute. That thereupon the court rendered a decree of foreclosure in favor of McGalligan against Miller. Miller sues out of this court his writ of error, and assigns for error the rendition of said decree. It is contended by defendant in error, that Burns and McBride were the trustees of McGalligan in equity, their assignment being fraudulent. Suppose this to be true, Miller was never summoned to answer a bill describing such an interest, or to respond to parties complainant of such a character. Had Burns and McBride filed a bill describing their character as trustees, or had McGalligan filed a cross-bill, setting out his interest in the matter in controversy, and called upon Miller to re-

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spond, and he had been in default, a decree of foreclosure would have been correct.

But when the decree was rendered, Miller was in default to no one, the bill having been dismissed ; and therefore the decree was erroneous. The bill was dismissed upon the motion of McGalligan, and having so summarily disposed of the parties complainant, it would be highly iniquitous to permit him to turn upon his co-defendant, and cause a decree to be rendered against him in his own favor.

It is true that the power of the chancellor will not be questioned, to render a decree according to the very right of the parties, whether complainants or defendants, when the parties have been properly brought into court ; but such a decree could not be rendered until the plaintiff in error had been made to stand as an adversary party by motion, cross-bill, or otherwise to McGalligan. The decree will therefore be reversed.

CASES
IN
Law and Equity,
DETERMINED IN THE
SUPREME COURT
OF
THE STATE OF IOWA;

DUBUQUE, JULY TERM, A.D. 1848,

In the second year of the State.

PRESENT:

HON. S. CLINTON HASTINGS, CHIEF JUSTICE.

" JOHN F. KINNEY, } JUDGES.
" GEORGE GREENE, }

SPEAR et al. v. SPENCER.

Jurors who rendered a verdict against the defendants on an indictment, are not competent jurors in an action of trespass against the same defendants, involving the same questions, and in relation to the same subject matter; nor are they rendered competent by declaring upon their *voir dire* that they had not formed or expressed an opinion.

ERROR, to Jones District Court.

W. G. Woodward and *C. C. Rockwell*, for the plaintiffs in error, cited 2 Clerks N. Y. Digest, 318; 21 Wend. 509; 6 Cowen, 62, 65, 557; 1 John. 316; 4 Wend. 229; 14 ib. 131; 3 Bac. Ab. 757; Wharton's Am. Cr. L. 605, 612; 2 U. S. Dig. 686 et seq. §§ 11, 12, 13, 15, 17, 18, 27, 33, 34, 109; 14 S. & R. 292.

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J. P. Cook and *I. M. Preston*, for the defendant. It is no ground of error that jurors were allowed to try this cause who had sat in a criminal cause against the same defendants, where the jurors (as in this case) upon their *voir dire* solemnly swear that they have not formed or expressed an opinion. See Wharton's Digest, 366; 2 U. S. Digest, 386. §§ 14, 15, 16, 19, 25 and 28.

Opinion by KINNEY, J. This was an action of trespass, tried at the September term of Jones County district court, 1847. It appears from the bill of exceptions that upon the day preceding the trial, a criminal cause was tried, in which the plaintiffs in error were convicted for an assault with intent to commit a bodily injury. It also appears from the bill of exceptions that the action of trespass was based upon the same facts, involving in the issue the same transactions as those tried and determined in the criminal cause, upon which the defendants had been found guilty.

An objection was made to six of the jurors, by the defendants alleging their incompetency upon the ground that they were jurors in the trial upon the indictment, and had expressed through their verdict their opinion. These jurors were placed upon their *voir dire*, and being informed that the civil cause was in relation to the same facts as the one which they had tried, said that they had not formed or expressed any opinion.

Whereupon the court annulled the objection to the jurors, and the cause was tried, and a verdict of guilty returned against the defendants.

The action of the court in overruling this objection is assigned for error.

The counsel for defendants in error insist that as the jurors brought themselves within the test, by stating under oath that they had not formed or expressed any opinion in the case, that they were competent jurors. This is a rule which has been universally adopted in our courts, the object of which is to satisfy the court that the jurors have neither

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formed nor expressed any opinion, and are, therefore, free from bias, feeling, or prejudice. While, therefore, we would not innovate upon this well-established practice, still we cannot but conclude that in this case there was no necessity for the court's resorting to this test, as it must have been apparent that the jurors could not thus free their minds from those feelings of prejudice and disfavor, which the testimony, arguments, and verdict of an exciting criminal cause must have produced.

If the six jurors were competent, then the entire pannel that tried and convicted the same defendants in the criminal prosecution was a competent pannel in the civil action depending upon the same facts and proof; and as the jury in a criminal cause must be satisfied beyond a reasonable doubt of the guilt of the defendants, before they are authorized to return a verdict of "Guilty," and as in a civil cause the preponderance of testimony forms the basis of the verdict, it appears to us that a verdict against the defendants in a civil cause, depending upon the same facts as those upon which they had been convicted upon on indictment, would be inevitable, providing both are tried by the same jury.

It should be a primary object with the court, in the administration of justice, to preserve the purity of the jury box, and, if possible, to prevent persons from sitting as jurors upon the rights and liberties of men, where prejudice, feeling, or preconceived opinions, are to influence a verdict, which ought always to be impartial and the legitimate result of law and evidence.

While the competency of jurors is left to the discretion of the court, it ought always, in order to give the parties the benefit of an impartial trial, to prevent those men from becoming jurors, who, it appears, have formed an opinion, or whose minds are corrupted with improper prejudice and feeling, although they may say upon oath that they are free from these disabilities. Without this salutary check, the purity of jury trials cannot be preserved, nor the rights of parties properly maintained.

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In the case before us, six of the jurors who had tried and convicted the defendants upon an indictment involving the same questions and facts, were permitted to sit as jurors, and as we think it was impossible for them not to have formed an opinion upon the same matter involved in the issue at law, (although they may innocently have thought differently,) yet we are fully satisfied that they were incompetent jurors, and that it should have been so ruled by the court.

The judgment of the court below is reversed, and a *venire de novo* awarded.

BLAKE v. DORGAN.

A court of equity may dissolve a partnership, when difficulties between copartners are of so serious a nature as to render the continuance of the company impracticable, and injurious to one or both of its members.

It may be doubted, whether either member of a copartnership can dissolve it, where its duration is fixed by articles of covenant for a term of years.

The fact, that the petitioner for a dissolution of a partnership may have committed the first wrong, affords no excuse for wrongs committed by the other party, and should not prevent a dissolution, when the deportment of each party is hostile to the harmony, prosperity, and continuance of the firm.

IN EQUITY, *Appeal from Dubuque District Court.*

This case was decided at Iowa city, but the opinion was subsequently delivered at Dubuque.

This was a petition to obtain a dissolution of a partnership made upon the following agreement: "This article of agreement, made and entered into this twenty-ninth day of August, A. D. 1843, between Dennis Dorgan, of the county of Dubuque and territory of Iowa, of the first part, and John Blake, of the same county and territory, of the second part,

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Witnesseth : that whereas the said Dorgan is seized and possessed, in fee simple, of a certain tract or parcel of land, situate in the city of Dubuque, in said territory, and in which said tract he, the said Dorgan, promises and engages to sink, dig, and erect a well for water. The said Blake, on his part, is possessed of such certain tools and implements as are necessary for brick-making, which he, the said Blake, agrees to deliver on the lands of the said Dorgan above described, and thence the said Dorgan and Blake are to become joint partners in the art of making brick, to contribute equal costs and expenses, and to share equal profits and loss, for the term of seven years. But in no case shall the said Blake hold any title or interest to the lands of the said Dorgan, other than his joint and equal right to such clay as they make brick of, nor shall the said Blake be permitted, by this article, to make sale or transfer of such right as he acquires by these presents, to the brick clay. But should he, at any time within the seven years above referred to, desire to withdraw from the partnership, his right shall revert to the said Dorgan ; and should either party, within the seven years, fail or refuse to furnish his proportion of one half the labor and expenses, necessary to the making of the brick, then the other party shall proceed with the work, and shall charge the amount of such proportional labor and expense to the delinquent party, together with an interest of ten per cent. on the same. And at the end of the said seven years, the said partnership shall be dissolved, and the lands, and everything appertaining thereto, shall be the property of the said Dorgan, and such other property as is then on hand, shall be the joint property of the said Blake and Dorgan, to be disposed of for their mutual benefit, as they or their legal successors may direct." This agreement is set forth in the petition, and admitted by the answer. The complainant then alleges, that he went on according to agreement, and sunk a well of water ; that for the purpose of apportioning the expenses of the brick-making as equally as might be, it was agreed that each should board his portion of the hands employed, and use their

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respective teams, each alternate week, upon the company business; and that, in accordance with the written agreement and these arrangements, they entered into the business, and continued till June 20, 1846. The petition then charges, that at the above date, the defendant, without the consent of the petitioner, and for the purpose of unjustly charging him with his portion of the expenses, with ten per cent. interest on the same, ordered and directed the hands, boarding with petitioner, to go to his house for board, which they did; that defendant would not permit him to work his horses on the brick-yard, in order to increase charges against him; that the defendant, by threats, menaces, insults, and perverse oppressive deportment, rendered it impracticable and wholly inexpedient for them to carry on the partnership business together. Most of the charges contained in the petition are denied by the answer. Depositions were taken by the parties, in support of their respective allegations. The petition, answer, and depositions, all concur in showing a serious and protracted partnership quarrel between the parties, and disclose a mutual aversion to their partnership connection. In the court below, decrees of a dissolution, and for an account of partnership assets, and an injunction, were granted.

Timothy Davis and *P. Smith*, for the appellant.

S. Hempstead and *J. E. Sanford*, for the appellee.

Opinion by HASTINGS, C. J. The bills, answers and depositions in this case conclusively show that there was no error in the court below, in decreeing a dissolution of the copartnership between the parties. The nature of the business for which the copartnership was created was such, that not only capital, skill and labor were required to carry on the business, but mutual confidence and good faith, without which the copartnership should, and would be forced to cease. And though, in the language of the book, "the court will require a strong case to be made out before it will dis-

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solve a partnership and decree a sale of the whole concern ;” and although, from the depositions in this case, it would be difficult to decide which of the parties is most in the wrong, there is no doubt that equity demands a decree of dissolution, in this case, as a continuance of the copartnership would have been impracticable, and would have, in the end, been disastrous to the interests of one, if not both of the copartners. It is not in the power of any court to decree a continuance of the business, pursuant to the terms of the agreement, without at the same time assuming the high prerogative of decreeing a personal reconciliation and restoration of mutual confidence. It may be doubted whether it was in the power of either party to dissolve the copartnership, its duration being fixed by covenants for a term of years. But in the case of *Skinner v. Dayton*, 19 Johns. Rep. 538, Platt, J. held that a member of a copartnership fixed for a term of years by articles of covenant, had the power to dissolve the same. And the reasoning of Justice Platt is favorably commented upon by Chancellor Kent in his Commentaries, vol. iii. 55, and such is the French law ; and such we believe to be the more reasonable doctrine, leaving the injured party to his remedy on the articles or covenants. But no one will doubt the power of a court of chancery, when properly addressed, to decree a dissolution. We will not proceed to inquire who was the original author of the difficulties between the parties, nor which party was most in the wrong. It is sufficient that the defendant Blake’s conduct amounted to an exclusion of the complainant from his proper agency in the business, and that the conduct of both parties was of itself evidence of a substantial dissolution, leaving it only for a court of chancery to go through the form of decreeing a dissolution, and settlement of the business of the partners in a manner best calculated to restore the parties to their original rights, and each party to an equitable participation in the profits and losses. It is urged that the complainant does not come into court with clean hands, for the reason that he was first in the wrong. We see no necessary connection between the

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wrong first committed by complainant and the subsequent wrongful acts of defendant. And from this argument, it would seem that the causes of dissolution are strengthened, both parties having been guilty of acts inconsistent with the continuance of their copartnership relations. Because Dorgan was first in the wrong, is no excuse for the wrongs afterwards perpetrated by Blake. If Blake desired to continue the partnership, and to refuse a dissolution, his repeated declarations of hostility to Dorgan's further participation in the business of the firm, and his contracts of sale of brick in his own name, were not consistent therewith, and evidence on his part a determination to effect a dissolution.

The decree of the district court is affirmed.

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Where evidence conduces to prove, even circumstantially or remotely, the question at issue, it should go to the jury. The court is not authorized to decide upon the sufficiency of evidence.

If evidence is demurred to, or otherwise taken from the jury, for the decision of the court, all the facts which it had a tendency to prove must be regarded as admitted by the objecting party; and the court will then decide upon the legal effect only of the facts thus established, proved, admitted, or inferred, and not upon the sufficiency of proof to establish those facts.

Where there is latitude given by statute as to the amount of the fine for a criminal offence, it is the exclusive province of the jury to fix the amount.

ERROR, to Dubuque District Court.

P. Smith, for the plaintiff in error.

L. A. Thomas, prosecuting attorney, for the state.

Opinion by GREENE, J. Indictment against *Franks* for retailing spirituous liquors without license. The issue was

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tried by a jury, and the defendant found guilty as charged. The court fixed the amount of the fine.

The evidence submitted on the trial is embodied in a bill of exceptions; and the court was asked to instruct the jury that it is insufficient to support the indictment. This was refused, and that refusal is now assigned as error. It is clear to our minds that the court below decided properly in this matter. The statute makes it the exclusive province of the jury to decide questions of fact; and these questions they are to determine from their own view and judgment of the testimony submitted to their consideration. If the sufficiency or insufficiency of testimony to establish any given fact, or determine an issue, should be decided by the courts, the sacred right of trial by jury may become utterly subverted. It cannot be doubted that instructing a jury of facts that are or are not sufficiently established by proof, is tantamount to a decision of those facts, and is beyond the legal province of a judge. His sphere is limited to the application of the law to the facts, and extends no control over the sufficiency of evidence submitted to establish them. However loose and indeterminate the evidence may be, still if it conduces to prove even circumstantially or remotely any relevant fact in the case, it should be confined to the determination of the jury; and if the evidence is demurred to or otherwise taken from the jury for the decision of the court, all the facts which the evidence tends to prove are to be regarded as admitted. It is then the duty of the court to decide upon the legal effect of those facts as proved, admitted, or inferred; and not upon the sufficiency of evidence submitted to prove them. If otherwise, the reference to the court would be a question of fact, and not of law. *Fowle v. The Common Council of Alexandria*, 11 Wheaton, 320; 6 Cond. 328.

The second error assigned is, that the court fixed the amount of the fine without authority of law. *Rev. Stat.* p. 158, § 87, provides that when any latitude is left as to the amount of punishment for any offence, the jury shall in all cases fix the amount of punishment. By a subsequent enactment in the

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same statute, p. 183, § 76, it is made the duty of the judge to determine the period of confinement when imprisonment is the punishment prescribed.

In this case the offender is subject to a fine, by statute, of not over one hundred, nor less than fifty dollars. There being a latitude in the amount of punishment, it was the duty of the jury, and not within the province of the court, to fix the fine.

But it is contended, that as the fine was placed at the lowest limit by the court, no injury could result to the defendant below, from the error. This may be true, but still the error is there. It was an exercise of power without authority or sanction of law. Though the jury could not have fixed the fine at a less amount, still they should have fixed it, as the law confines the duty exclusively to them. The mere fact, that the least amount was fixed upon by the judge, cannot confer the authority or legalize the act; it was still extra-judicial, and cannot be regarded by this court as of too trivial a nature to justify revision.

The judgment is reversed with costs, and the cause remanded.

McPOLAND *et al.* v. FITZPATRICK.

Under the state constitution, the supreme court cannot entertain jurisdiction of a chancery case on a writ of error.

IN EQUITY. *Error, to Dubuque District Court.*

L. A. Thomas and J. V. Berry, for the plaintiffs in error.

S. Hempstead, and *Rogers and Barney*, for the defendant.

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KINNEY, J. This case comes before this court upon writ of error. We have repeatedly decided in chancery cases, since the adoption of our state constitution, that the supreme court cannot take jurisdiction upon writs of error.

The only mode contemplated by the constitution for removing chancery cases to this court, is by appeal, and although no objection has been made by the counsel for the appellee, and therefore he has tacitly consented to a hearing of the case upon its merits, yet as merely implied consent is not sufficient to confer jurisdiction, the cause must be dismissed.

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Where the answer to a bill is not sent up with the transcript of the record, the respondent will not be permitted to file another answer; but where it properly appears that such answer is lost or destroyed, and that the defence therein set forth is substantial, the cause will be continued, in order to give the court below time to supply the lost record.

IN EQUITY, *from Jackson District Court.*

On motion to file an answer to the bill.

J. P. Cook, F. A. Chenoweth, for the motion.

Mr. Drummon, contra.

Opinion by HASTINGS, C. J. A motion is made in behalf of appellant, for leave to answer over or file with the record in this case an answer, (or the substance thereof,) which, it appears from the return of the clerk of the court below, is not on file in his office.

In support of this motion is presented an affidavit of one

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of the solicitors for appellant, that an answer disclosing a meritorious defence, was on file in the court below, on the hearing.

If the answer had ever been on file in this court, and was lost or destroyed, we would not hesitate to permit a copy to be filed as a substitute, and the contents of such lost record to be proved by affidavits and other testimony.

This court has no control over the records of the court below. That court is alone authorized, at its discretion, to provide substitutes for lost or destroyed records. It does not appear from the affidavits that the answer is lost or destroyed, but that it is not on file. No diligence appears to have been used to ascertain the fact of its loss or destruction. If the appellants show the loss or destruction of the answer, that the answer set up a substantial defence, and specify in what that defence consisted, we would not hesitate to continue the cause, to give the court below time to supply the lost record.

Motion overruled.

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An action to foreclose a mortgage under the statute, is regarded as a proceeding in chancery, and consequently, can only be brought to the supreme court by appeal.

IN EQUITY. *Error, to Jackson District Court.*

On motion to dismiss the writ.

Drummon, for the motion.

Cook and Chenoweth, contra.

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GREENE, J. A motion is made in this case to dismiss the writ of error, on the ground that it will not lie in chancery cases. It has already been decided by this court in the first district, that chancery causes under our constitution can only be brought up by appeal, and not by writ of error.

But it is claimed, that as this action was commenced under our peculiar statute concerning mortgages, it should be regarded as a case in law, and not in chancery. The act referred to requires a petition to be filed in the usual form, with a prayer that the equity of redemption be foreclosed, and the mortgaged property sold to satisfy the amount due. The 7th section provides for publication and proceedings therein, as in similar cases in courts of chancery. The reference "as in suits of chancery," is made in the 8th section as to unknown defendants and orders of publication. Indeed, the general feature and spirit of the act contemplates chancery jurisdiction and practice, and the words, "*judgment* may be rendered for the debt," cannot change the character of the act, or transform the proceedings under it from equity to an action at law. Though the word *judgment* is applied to the decision of the court upon the debt, it cannot change the nature of the decision; it is still a decree for the amount due, foreclosing the equity of redemption, and ordering the sale of the mortgaged property in satisfaction. The nature of the trust created by a mortgage determines the necessity of chancery adjudication in case of forfeiture, and is repugnant to the idea that a proceeding at law would be applicable.

Motion granted.

Blake v. Dorgan.

BLAKE v. DORGAN.

Exceptions to the final report of a master in chancery should be first taken in the district court, in order to bring the objection to the supreme court; but where it appears that the court below ordered a just item to be stricken from the account of the appellant, it raises a legitimate question for the action of this court, and will justify a reversal of the decree.

IN EQUITY. *Appeal from Dubuque District Court.*

This was a proceeding upon the report of a master in chancery, appointed by virtue of the decree rendered in preceding case of *Blake v. Dorgan*, ante, p. 537. The facts and points decided appear in the opinion of the court.

Thos. S. Wilson and *T. Davis*, for the appellant. 1. The fact that Blake superintended the business and labored for the partnership concern, is proved by the testimony, and not denied in any way.

2. The only reason for cutting him off from compensation would be, that his conduct was so bad as to authorize the dissolution of the partnership, and that his labor was an injury to the business. The testimony shows that Dorgan was first in the wrong, and that both parties were wrong. The opinion of supreme court shows that partnership was dissolved for the reasons that both parties had done wrong, and that it was for the interest of both of them that it should not be continued.

3. The record shows that the items in the account allowing Blake this compensation were stricken out by order of court, and that the report of the master rejecting these items was confirmed.

4. Where a master commissioner is ordered by the court to perform a ministerial act, and not permitted to exercise his own judgment or discretion, it is unnecessary to move to set aside his report. In such a case, he acts as the clerk of

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this court when a judgment is rendered for costs to be taxed by the clerk. See *Adams v. Claxton*, 6 Vesey, 231.

5. The fact that Blake continued to superintend the business after the dissolution of the partnership by the district court, is no reason why he should not be allowed at least laborer's wages, for two reasons:

First. It was necessary that some person should superintend the brick-yard; and the testimony shows that the business was well managed by Blake.

Secondly. The appeal, which he had a right to take, vacated the judgment of dissolution.

"An appeal suspends the effect of the decree appealed from." 3 Dallas, 87, 119.

"A valid appeal entirely vacates the judgment or decree appealed from," &c. Minot's Digest, p. 37, referring to *Paine v. Cowdin*, 17 Pick. 142; *Davis v. Cowdin*, 20 Pick. 510; *Campbell v. Howard*, 5 Mass. 376; *Keen v. Turner*, 13 Mass. 265, 266.

See also on the same point, 1 Term Rep. p. 2.

6. As the district court disallowed any compensation for this service of Blake, we ask that the judgment of that court, in this respect, may be reversed, and the cause remanded to the court below, with instructions to allow complainant a reasonable compensation for his labor.

S. Hempstead, Lovell and Samuels, for the appellee. Objections to master's report must be brought in before he makes his report, otherwise the court will not allow the party to except to it. 1 Paige, 145; 3 John. Ch. R. 79; 1 Maddox, 339, 555; 3 ib. 439; 1 Barbour's Ch. Prac. 546.

Exceptions to reports of masters in chancery are in the nature of special demurrers, and the party objecting must point out the error, otherwise the part not excepted to will be taken as admitted. 6 John. 566.

The making of objections is not a mere matter of form. 1 Barb. Ch. Prac. 547.

The appellant, not having excepted to the report before

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the master, nor before the district court, cannot make exceptions in this court.

Opinion by HASTINGS, C. J. It appears that on the 30th day of April, 1847, the district court, on exceptions taken by the complainant, ordered the report of the master to be re-committed, with instructions to strike out certain items of account, allowed by the master to the defendant, for his labor done after the happening of the cause of the dissolution; and it appears, from the amended report, that in obedience to such instructions, such items were stricken out, and that the court rendered a final decree upon the amended report. From the decision of the court, in making the above order, an appeal is taken to this court. An objection is urged, that the defendant should have excepted to the final report of the master, and that no objections to a master's report can be sustained, unless exceptions are filed before the court below. As to any matter passed upon by the master, and reported to the court, we believe the objections to be well taken; but the striking out of the account of defendant his charge for his own labor in the manufacturing of the brick, was ordered by the court, and so appears of record.

It seems to be just, and in accordance with the strictest principles of equity, that if Blake is to be charged with the sale and proceeds of the brick of the copartners, he should be credited with the cost and expense of their manufacture. In accordance with this principle, it seems that the master allowed Blake all such expense and costs, except his own labor, in his final report. We think the court below erred in refusing to allow Blake's item for personal services, and that if the court below had been in possession of the opinion of this court, upon the main questions in controversy, the order complained of would not have been made. We feel constrained, therefore, to reverse the order of the court below, disallowing the charges of the defendant for his personal services, believing that he should be credited therefor in his account with the firm. For the purpose, therefore, of ena-

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bling the court below to ascertain the actual value of the services of Blake, and giving him credit therefor, the decree is reversed; the appellant to recover only the costs of this court.

Decree reversed.

THE STATE v. DOUGLASS.

A criminal case may be brought to the supreme court by writ of error.

It is sufficient, before a justice of the peace, if the affidavit charges an assault in general terms.

Where the jury, before a justice, in a trial for an assault, returned a verdict of "guilty of a breach of the peace" against the accused, and assessed the fine at five dollars, it was held to be substantially correct.

ERROR, to *Dubuque District Court*.

GREENE J. A motion is made in this case to dismiss the writ of error, on the ground that it will not lie in a criminal case. As we can see no sufficient reason or authority to support this motion, it must be denied. Our statute places the matter beyond question, that writs of error are applicable in criminal cases. *Rev. Stat.* p. 157, § 77. *Stat. of 1844*, p. 6, § 1; and p. 9, § 35.

L. A. Thomas, prosecuting attorney, for the state.

P. Smith, for the defendant.

Opinion by GREENE, J. Douglass was prosecuted before a justice of the peace for an assault. Trial by jury, verdict of guilty, and fine assessed at five dollars. The case was taken to the district court by writ of certiorari, and there reversed. We infer from the transcript of the record, that one or both of the following two reasons induced the court below to reverse the judgment of the justice.

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First, the affidavit does not sufficiently specify the facts and circumstances of the offence.

Second, the verdict does not sufficiently specify the offence of which the jury found the defendant guilty.

The affidavit in general terms charges, that on the first day of November, 1845, Joseph M. Douglass committed an assault upon him, the deponent, in the county of Dubuque, &c. This, under the statute, we regard as sufficient. The 3d section in the 9th article of the justice's act, requires only a complaint on oath or affirmation, that an assault, battery, affray, or other breach of the peace, has been or is about to be committed. The statute does not contemplate the same formality, and particularity of description, as would be required in an indictment, or complaint for a formal common-law trial. A general complaint, or even the personal knowledge of the justice, without complaint, is sufficient to justify an arrest, and then the statute provides that the case shall be heard and determined, not with technical formality, but "*in a summary mode.*"

The verdict too we regard as substantially correct. The statute is complied with, and that is all that should be required. The jury tried the charge against the defendant, and returned the following verdict: "We, the undersigned, do find the defendant guilty of a breach of the peace, and agree that he shall pay the sum of five dollars and costs." Leave the surplusage out, and it is still a good verdict. It was only necessary for them to find the defendant guilty, and assess the fine; and this they do in their verdict, though with some redundancy, but which cannot render their intention ambiguous.

We think the proceedings before the justice of the peace in this case, were conducted substantially in accordance with the statute regulating them.

The judgment is reversed with costs, and the cause remanded.

Motion denied.

Green v. Drebilbis.

GREEN v. DREBILBIS.

Where no time of payment is mentioned in a note, it is in contemplation of law payable on demand.

Such a note should be described in the declaration as a note payable on demand; but the words "on demand" need not be used, if words of equal import aver the time of payment.

ERROR, to Dubuque District Court.

P. Smith, for the plaintiff in error.

Davis and Bessell, for the defendant.

Opinion by GREENE J. Assumpsit on a promissory note, in which no time of payment is specified. The defendant demurred to the declaration, principally upon the ground, that it contains no averment of the time when the note became due and payable. The demurrer was overruled, and judgment rendered for the plaintiff. The overruling of the demurrer is the only error assigned. It is very correctly assumed by counsel for plaintiff in error, that, where no time for payment is mentioned in a note, it is, in contemplation of law, payable on demand. In *Chitty on Bills*, 10 Am. ed. 150, 151, the principle is recognized, that if no time of payment is mentioned in a note, it operates like a check on a banker, as payable on demand. In 8 John. 189, and 1 Conn. 404, it is held that a note payable generally is payable on demand. m

In this case the declaration is objected, on the ground that it does not specifically describe the note according to its legal effect. The note should, no doubt, be declared on as a note payable on demand, but it does not necessarily follow that the particular words "on demand" should be incorporated in the declaration, if it alleges in other terms the time when the note became due; and in this particular we can but consider the declaration sufficient in law. It distinctly avers, in referring to the date of its delivery to the plaintiff, "the entire amount in said note, then being due and unpaid;" and

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again, that "the defendant became liable to pay the sum of money in the note specified, when he should be thereunto afterwards requested." These averments, with others in the declaration of a similar import, sufficiently designate the note as being due, and payable from the date thereof, according to its legal intendment. Though not declared on in the most technical form, or according to the most approved rules of pleading, we can but regard the averments in the declaration as sufficiently explicit to entitle the plaintiff to recover.

Judgment affirmed.

 MINERS' BANK OF DUBUQUE v. UNITED STATES

A bank, in which the stock is owned by individuals, is a private corporation. Grants and franchises are to be construed in favor of the state.

Upon a proper showing, a judicial tribunal may vacate the charter of a bank for misuse or abuse, when the legislature does not reserve that power; but if the legislature reserve to themselves the power to repeal a charter or act of incorporation upon a misuse or abuse of corporate powers, they may do so without the interposition of a judicial tribunal: they are the proper judges of such misuse or abuse; and their acts, their motives, or the sufficiency of evidence before them, cannot be collaterally questioned. It is not the province of the judiciary to determine whether a law is, or is not enacted expediently, or under proper contingencies and motives, and thereupon decide as to its validity. It is their province to place upon them a legitimate construction, and enforce them so far as they are adjudged constitutional.

ERROR, to Dubuque District Court.

This was an information in the nature of a *quo warranto* filed by the United States, on the relation of the prosecuting attorney, against the president, directors and company of the Miners' Bank of Dubuque. The bank pleaded the act of incorporation. The prosecuting attorney then filed a replication, setting up the statute of 1845, repealing the char-

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ter of said bank. To this replication the bank rejoined, that the repealing law was enacted without a failure of the bank to go into operation, and without its having misused or abused its privileges. A general demurrer was filed to the rejoinder, which was sustained by the court, and judgment rendered accordingly against the bank.

T. Davis and *P. Smith*, for the bank. The following argument was submitted in writing by Mr. Smith. As the pleadings now stand, the only question that addresses itself to the consideration of the court is, whether the legislature had the right to repeal the charter, without the bank having first failed to go into operation, or having abused or misused its privileges. The demurrer admits the fact stated in the rejoinder, which admission establishes the fact that the contingency contained in the reservation of the charter had not happened at the time of the supposed repeal. The case then presents the naked question, whether the legislature can repeal a bank charter without any default or misconduct on the part of the bank. And in the discussion of this point is involved a grave constitutional question. We contend that the repealing act is void, on the ground of repugnancy to the constitution of the United States and the ordinance of 1787. And in evolving this question, it is but natural for this court to turn its eyes upon the decisions of the supreme court of the United States, as the highest and most authoritative known to our Union. Indeed it has been repeatedly decided that the decisions of this learned and distinguished court, with regard to all constitutional questions, are final and conclusive. *Mich. State Bank v. Hastings*, 1 Douglass, Mich. R. 235.

1. We take the ground that the grant of a bank charter is a *contract*, and that it is a *private* contract executed.

2. That the *franchise*, as a *franchise*, is *property*; a vested right which, when granted, cannot be rescinded by the grantor, without the default of the grantee.

And as to the first proposition, that a bank charter is a

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private contract. In the case of the *Providence Bank v. Billings*, 4 Peters R. 560, C. Justice Marshall says, "It has been settled that a contract entered into between a state and an individual, is as fully protected by the tenth section of the first article of the constitution, as a contract between two individuals; and it is not denied that a charter incorporating a bank is a contract." And in the same opinion, he repeatedly calls it a "*private contract.*" And again, in the case of *Dartmouth College v. Woodward*, 4 Wheaton, 518, the same learned judge, in delivering the opinion of the court, says, "It can require no argument to prove that the circumstances of this case constitute a contract." And after the fullest discussion of the particular point, as to whether the charter of a college was a *public* or a *private* contract, pronounced it to be a *private contract*, which could not be impaired without violating the constitution of the United States.

Justice Washington, in the same case, repeatedly calls the charter a contract; he too says it is a private, instead of a public contract. He says, "It has been insisted that it was a public, instead of a private corporation; but the authorities are all the other way."

Justice Story, in the same case, says, "Another division of corporations is into public and private. Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests; but strictly speaking, public corporations are such only as are founded by the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and object of the institution. For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So a hospital created and endowed by the government

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for general charity. . But a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal bridge, and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private, as much so, indeed, as if the franchises were vested in a single person." And again, he says, "The fact, then, that the charity is public, affords no proof that the corporation is also public; and, consequently, the argument, so far as it is built on this foundation, falls to the ground. If, indeed, the argument were correct, it would follow, that almost every hospital and college would be a public corporation, a doctrine utterly irreconcilable with the whole current of decisions since the time of Lord Coke." Case of Sutton's Hospital, 10 Co. 23.

The supreme court of Ohio calls a bank charter a *private contract*. Case of quo warranto, *State v. Granville Alexandrine Society*, 11 Ohio, R. 15; ib. in Illinois, 1 Gilman, R. 672; ib. and in Michigan, 1 Douglass, R. 234; 2 Kent Com. 306; 6 Cranch, 88; 7 ib. 164; 9 ib. 43, 292: and this doctrine is also fully sustained in New York, N. Y. Dig. vol. i. 457; and in Mass. Minot's Dig. 164; and in all the states of the Union. Vid. Angell and Ames on Corporations, 8, 21, 22; Amer. Com. Law, 3 vol. 441, and authorities there cited. We deem that perhaps these decisions may suffice on this point, until at least a single decision may be found to the contrary.

Having disposed of the first point, we will now proceed to consider the second, viz.: Whether a bank charter, a mere franchise, as a franchise, is property. And here we take occasion to say, that Chancellor Kent has classed franchises under the general head of real estate. He says, that "an estate in a franchise, and an estate in land, rests upon the same principles." 3 Kent, Com. 458. And Justice Wayne, in delivering the opinion of the S. C. of U. S., in the case of *Gorden v. Appeal Tax Courts*, 3 Howard, 150, says, "The

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franchise is their corporate *property*." And again, on the same page, "The capital stock is another property, corporately associated for the purpose of banking, but in its parts is the individual property of the stockholders, in the proportion they may own them." By this it is evident that the court in this case considered the franchise as a distinct property from stock.

And again; the same judge, in pursuing the distinction, says, "This is not only the case in Maryland, but a franchise for banking is in every State of the Union recognized as property." "The banking capital is another property."

Justice Story, 4 Cond. R. U. S. 576, says, "I am unable to distinguish between the case of a grant of land or of franchise." Again, in the same case, page 580, he says, "In respect to corporate franchise, they are, properly speaking, legal estates, vested in the corporation itself as soon as it is in esse." And again, in the same case, speaking of the right of the legislature to resume the grant of a franchise, he says, "This question cannot be answered in the affirmative, until it is established that the legislature may take the property of A. and give it to B; and if it cannot take away or restrain corporate *funds*, upon what pretence can it take away or restrain the corporate *franchise*?"

We trust that the above authorities are sufficient to establish, to the satisfaction of the court, that a franchise is property; and we will now proceed to discuss the question, whether the legislature can revoke a grant, executed where the grantee has entered into and possessed the property granted for years, without any default on his part. And here, to illustrate the principle, let us suppose a case: The legislature makes a grant of land or other property to A., with a reservation of right to resume the grant, provided that A shall at any time thereafter commit treason or any other offence; and suppose under this grant that A. should enter into possession of, and enjoy the granted premises for several years, the sovereign power in the meantime (as in the case now at bar) repeatedly passing acts recognizing the grant.

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but after all this, suddenly and without notice, the legislature should pass an act rescinding the grant, and seizing the land or franchise granted into its own hands—would this be *prima facie* a constitutional act? or would it be *ipso facto* void? Reason and common sense answer, most certainly it would be void. And yet there is no perceivable distinction between such a case and the case at bar.

But we are told by the prosecuting attorney, that the mere fact of resuming the grant, furnishes evidence that the contingency, giving the right to resume, had happened. Is this correct? If so, what kind of evidence is it? Is it *prima facie*? or is it conclusive? Let us apply the principle to the case just put. Would the mere fact of the passage of an act, that did not upon its face purport to be based upon the fact, that the contingency had happened, be conclusive evidence that A. had been guilty of treason? Or would he be permitted to contest that fact before a court, and deny that he had been guilty, as we now do in the present case?

Let us suppose a stronger case. Suppose the legislature should pass a law as follows: "Whereas, a just compensation has been made to A. for his farm," and should go on and appropriate the same to public use, would the preamble to such an act estop A. from contesting the fact that he had received no compensation for his property? If so, the validity of any such act can never be questioned in the courts.

And it would be raising a presumption of purity and infallibility in favor of legislative acts, of very modern growth. The framers of the constitution did at least suspect that in some instances the legislatures of the states might transcend their authority. And so did the framers of the ordinance of 1787; whence the restrictions found in these instruments. And experience has abundantly confirmed the wisdom of their foresight. 2 Cond. Rep. U. S. 322. C. J. Marshall says: "Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed with some apprehension, the violent acts which might grow out of the feelings of the moment; and

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that the people of the U. S., in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions found in this instrument on the legislative power of the states, are obviously founded in this sentiment, and the constitution contains what may be termed a bill of rights for the people of each state." And under this bill of rights contained in the ordinance as well as the constitution, we claim the right to a judicial investigation, which shall fully sift and try the validity of the groundwork, upon which the legislative act in question is based. To use the phrase of C. J. Marshall, could this bill of rights be called a shield for the protection of property, if we indulge in such presumptions as have been contended for? A lawyer must be hard run for an argument, who resorts to such a subterfuge as this: it will afford but a flimsy shield to protect an unconstitutional act from the eye of a discriminating court.

We are told that we might as well go behind an act of the legislature to inquire whether it was passed by a competent majority. We admit the proposition. We affirm, whenever an unconstitutional act is sought to be sheltered behind such an act, that the courts never stop at the passage of the act, and presume all behind it to be right. We contend that whenever a law is sought to be impeached on the ground of unconstitutionality, the court will look behind the act. Thus for instance, in New York, the constitution of the state requiring "the assent of two thirds of the members elected to each branch of legislature, to every bill creating, continuing, altering, or renewing, any body politic or corporate;" and the legislature having passed an act of incorporation, the court say that from the mere fact of the passage of the act, it must be deemed *prima facie* at least to have passed by a majority less than two thirds, and that the certificate of the secretary of state, endorsed upon the bill, pursuant to the *Rev. Stat.* 157, sec. 11, is not evidence that it was passed by a vote of two thirds; at all events, it is not conclusive evidence. *Penely v. The Peo-*

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ple, 4 Hill, 384; *State v. McBride*, 4 Mo. R. 303. We presume that the strict construction given in the above case, would apply to those cases only where the validity of the act was directly drawn in question, and where the act was sought to be impeached on the ground of unconstitutionality. But in other cases the statute book containing the law, would afford a sufficient presumption that all the prerequisites necessary to make a valid law, had been complied with. But this would be but the ordinary presumption that official servants have done their duty.

The court will recollect that there is a presumption in law that every person is innocent until he is proved to be guilty. Therefore there is less reason for the court to presume that the bank had violated its charter, than there was in New York that the act was not passed by a two-third majority. In New York, if the court had presumed that, from the mere passage of the bill, and the ordinary certificate of the Secretary of State, it would have been but to presume that a public body did its duty. This the court refused to do.

In the present case presumption must be heaped upon presumption, in order to attain the end contended for by the prosecution. In the first place, we must presume, from the mere fact that the legislature reserved the right of repeal upon condition that the bank violated its charter, that they also by implication reserved the right to adjudicate the question of forfeiture: this is the ordinary business of courts of justice. *A fortiori*, it is a judicial rather than a legislative act. Hence they could not be said to reserve power never possessed. Secondly, that the bank had been guilty of a violation of its charter; and, thirdly, that the legislature had given practical exercise to its reserved judicial powers, and declared the bank guilty.

The supreme court of Ohio says, "That the legislature, having granted powers to a private corporation, cannot, consistently with the constitution, take away those powers, without any default on the part of the corporation, is too

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well settled to be questioned by *any who regard the stability of the law, the authority of judicial decisions, or the safety of our institutions*. And even when a corporation has violated its charter, it is rather a judicial than a legislative question, whether such violation is a cause of forfeiture." *The State v. Granville Alexandrine Society*, 11 Ohio, R. 15. Also in the case of *Michigan State Bank v. Hastings*, 1 Douglass, Mich. R. 234, the court say, that if this question was an original one, we should feel bound to give to the arguments of counsel the most deliberate consideration: but if there is any one question more firmly settled than another, it is, that a private corporation, whether civil or eleemosynary, is a contract between the government and the corporators; and the legislature cannot repeal, impair, or alter the rights and privileges conferred by the charter, against the consent and without the default of the corporation, judicially declared and ascertained.

S. Hempstead and *L. A. Thomas*, for the bank. These gentlemen argued the case *ore tenus*; as their points and authorities were not submitted in writing, we are unable to give them.

Opinion by HASTINGS, C. J. The issue presented by the amended rejoinder of the plaintiff in error, and the demurrer thereto by the defendants in error, raises the question for the adjudication of this court, of the validity of the act of repeal, pleaded in defendant's replication.

By the 23d section of the Act of Incorporation, it is provided—

"That if the said Corporation shall fail to go into operation, or shall abuse or misuse their privileges under this charter, it shall be in the power of the Legislative Assembly of the territory to annul, vacate, and make void this charter."

There was much said in the argument of this case about the character of this institution, as to whether it is a public

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or private corporation. The stock being owned by individuals, it cannot be reasonably doubted that it is a private corporation in which the public have no interest or control, except to exercise a supervisory power, and to annul its charter when the franchises granted are misused or abused.

Had the stock been entirely owned by the state, it would have possessed the character of a public corporation.

The plaintiffs in their rejoinder would go behind the act of repeal, and set up matters in avoidance of the act, averring it was passed without the happening of the events which would authorize the legislature to annul and make void the charter.

There appears to be no rule of construction better established in the English books, than that "public grants are construed strictly in favor of the king," and in this country in all conflicts between the sovereign power, and grantees enjoying exclusive privileges conferred upon them by acts of incorporation, the same rule of construction prevails. See *United States v. Arrendondo et al.* 6 Pet. Rep. 738. Also, *Charles River Bridge v. Warren Bridge*, et al. 11 Pet. 514.

It is argued that the investigation of the facts to be inquired into, and found to exist, as an abuse or misuse of privileges of the corporation, was a judicial act;—that before the legislature had a right to repeal the act of incorporation, such facts must have been judicially ascertained. It is conceded that without any reservation of the right to repeal, the judicial tribunals would have the power to annul and make void the charter upon ascertaining, by a proper issue, such misuse and abuse.

If, then, it were now necessary to form an issue in the courts and judicially investigate such facts, it would seem absurd in the legislature to have reserved the right thereafter to repeal, when the same end could be accomplished as substantially and more speedily by the court which tried the issue. Such reasoning must lead to the inference that the clause providing for a repeal means nothing.

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The more reasonable construction of this clause, it is believed, is, that the legislature, in order to protect the public from the frauds frequently practised by banking institutions at the time when the corporation was created, especially in many of the western states, and also to prevent the mischief of great delay in the territorial courts, [then imperfectly organized in legal proceedings,] reserved to itself the power of inquiring into and finding the facts which the act of incorporation declares shall exist before the right of repeal shall be exercised.

It is urged as a great hardship for this right to be interposed to the detriment, if not destruction of the property of the corporation, which engaged in the enterprise at great expense, and in good faith.

The legislature made a liberal grant of power and privileges to the original grantees, and they accepted of the grant, subject to the limitation and restrictions imposed. It is again urged, that the act of incorporation is a solemn contract, which the legislature, by their act of repeal, have violated.

Follow the strict rules of construction which prevail in questions of grants and contracts between private persons, and it will be seen that the legislature have not violated the conditions upon which the corporation was created. The plain interpretation of the grant is, that the legislature did grant certain powers and privileges to be exclusively exercised and enjoyed, upon a reservation of the power of cancelling the grant and annulling the same whenever such privileges should be misused and abused, the members of the legislature being the judges of the time when, and extent to which such abuse and misuse should be committed. If the corporation have suffered from the undue exercise of such power, they have only to censure themselves for the folly of accepting the grant upon the terms specified.

It is to be presumed that the original grantees believed that no legislative assembly would ever exercise the power of repeal until the contingencies contemplated had happened. Such was the confidence reposed in the good faith which the

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legislative assembly is presumed always to exercise towards the rights of the citizens, and it is to be regretted, that the plaintiffs in error should have had their confidence so shaken, as to feel themselves authorized to spread upon the records of a court, facts, if true, which would involve the members of the legislature in the deepest turpitude and corruption. The plaintiffs propose to prove, that when the act of repeal was passed, the bank had never misused or abused its privileges, and did not fail to go into operation. However legitimate it might have been for the plaintiffs in error to prove such facts, before the legislature and its committee, they are now forever estopped by a solemn decision in both branches of the legislative assembly. If we award to the act of repeal the weight and power of a judgment of a court of record, or even of a justice of the peace, it will be readily admitted, that it is not in the power of this or any other tribunal to collaterally question the validity of this act.

In *Voorhees v. The U. S. Bank*, 10 Pt. the court say, "If the principle once prevails, that any proceeding of a court of competent jurisdiction can be declared a nullity by any court after a writ of error or appeal is barred by limitation, every county court or justice of the peace in this Union may exercise the same right from which our own judgments or process would not be exempted."

It is true, that from a judgment of inferior judicial tribunals, in some manner an appeal can be taken to a superior within a limited time, but not so from the decision of the supreme judicial power of the land. Their decisions are final, and their judgments import absolute and unquestionable verity; and so it is with the sovereign legislative power in all their decisions and acts upon "rightful subjects of legislation;" and that the investigation into the facts upon the ascertainment of which the legislature reserved the right of repeal, is a rightful subject of legislation, is clear from the fact, that the corporators have made it so by their acceptance of the charter with such a right reserved.

In the case of *Crease v. Babcock*, 23 Pick. 340, the court

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say, "If a default has been committed, then, by the express terms of the compact, they [the legislature] have the right to exercise the power." They have exercised it, and therefore by the courtesy and confidence which is due from one department of the government to another, we are bound to presume that the contingency, upon which the right to exercise it depended, has happened. Nor is the objection, that the legislature had no power to inquire into the contingency, valid. If any man or body of men is invested with power to do certain acts upon the occurrence of a certain event, when the event happens, they have a right to perform the act. But we do not believe that the inquiry into the affairs of a corporation, with a view to a continuance or discontinuance of it, is a judicial act.

Had the defendants in error traversed the rejoinder, and formed an issue to the jury, the trial would have directly resulted in an investigation into the evidence before the committees and the two houses of the legislative assembly, and if such an investigation should have been permitted, it would follow that the motives of the members would have come under the review of the court and jury; and if this could be done in this case, the same practice as to other acts of the legislature might prevail; this would extend the jurisdiction of the courts, from expounding the law as they find it, to decisions of what the law should be, a doctrine repudiated by all enlightened courts, except in cases of clear conflict between the constitution and legislative acts, when it is made the duty of the judicial department of the government to interpose and preserve the integrity of that instrument, which is above the reach of legislative interference.

In the case of *Fletcher v. Peck*, 6 Cranch. Rep. (2 Cond. 318,) Chief Justice Marshall, in delivering the opinion of the court, says, "That it may well be doubted how far the validity of the law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court

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of justice. If the principle be conceded, that an act of the supreme sovereign power might be declared null by the court, in consequence of the means which procured it, still there would be much difficulty in saying to what extent those means must be applied to produce this effect."

It is argued for the plaintiff in error, that the legislature have pronounced their own contract rescinded, and annulled the same; and this is urged as an objection to the validity of the act of repeal.

However oppressive it may appear for a party to a contract to reserve the right of rescinding the same at pleasure, or upon the occurrence of events, of the existence of which he is to be the judge, yet that a party has a right to make such a reservation, will not be questioned. The members of the legislature are the agents of the public, and are presumed to have no personal interests to serve, other than what pertains to their constituents in common with themselves. They act in a fiduciary capacity, and are not amenable to the odium attached to a party who reserves the right of being a judge in his own case.

The judgment of the district court is affirmed.

RUSSELL, et al. v. LODE, et al.

Where eighty acres of land were purchased at the land-office by C., in trust, and with the understanding that he should deed to the two claimants L. and R.; to L. all of said eighty lying west of a certain road, and to R. the residue; and L. furnished C. with the necessary entrance money for his portion of the land prior to the purchase; a question arising between R. and M. in relation to the location of the road, as differently surveyed by three respective surveyors; it was held that the survey should be recognized, which followed the road as generally travelled, and which had previously marked the boundary between the two claims; and especially as such survey constituted the data upon which arbitrators appointed by mutual consent had

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previously awarded the land in dispute to L.; and also held that C. as trustee was responsible to L. for such portion of the eighty acres of land.

IN EQUITY. *Appeal from Dubuque District Court.*

Lovell and Samuels, for the appellants. Prior to July 3d, 1846, Isaac Russell purchased from one Patrick Maloney the claim to certain lands lying in the county of Dubuque, and bounded on the west side by the territorial road leading from Dubuque to Davenport. The said Maloney, on the 3d day of July, 1846, sold to the Messrs. Lodes, appellees, his claim to a certain tract of land lying west of said territorial road, and bounded on the east thereby: thus making the road the dividing line between the parties to this appeal. And the principal difficulty now existing between the parties is, in determining where the said road runs.

In view of these difficulties, both the parties furnished one Conger certain moneys to be employed in purchasing the land in dispute, at the sales of the public lands, which land was to be conveyed by said Conger to the party to whom it might be determined to belong. Said Conger did purchase the land at the land sales, and refused to convey to either of the parties until they could determine who was properly entitled thereto.

In the mean while different surveyors were appointed to run the road and settle the question of its location. These surveys differed widely and materially. We shall and do insist, however, that the survey made by Guy H. Carleton is entitled to more weight and consideration with the court than the surveys of either Mr. Higbee or Mr. Anderson, for the reasons; 1st. That the parties selected Mr. Carleton, and agreed to abide by the survey he might make. 2d. Because he was the only one who had the means of determining with accuracy where the road did run,—he having a copy of the field notes of the original survey, and making the survey in accordance thereto.

The other surveyors were selected by the Messrs. Lodes, without the knowledge or consent of the appellant, and they

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surveyed the road as directed by the appellees without the appellant being present.

There was an effort made to adjust the difficulty by a reference of the questions in dispute to certain arbitrators. An award was made by these arbitrators, which admits of different constructions, and the meaning of which is differed about by the different arbitrators. Conger, at this time, understanding the award as insisted for by the appellant, made a conveyance of the disputed lands to Russell.

The only question, in our opinion, to be determined by your honors, is, whether the land in dispute lies east or west of the territorial road, leading from Dubuque to Davenport. If east, clearly the land belongs to Russell, the appellant, and this court will kindly interpose its authority to protect and preserve his rights. If, on the contrary, the land in dispute be west of the said road, the court will not hesitate to confirm the decree of the court below. We would refer your honors, on this point, to the deposition and survey of Guy H. Carleton.

S. Hempstead, for the appellee. There are two questions involved in this case : 1. The true boundary established between the complainants, and Russell the defendant, by the arbitrators ; and second, whether the complainants furnished Patrick Conger, defendant, with the money to purchase the land in dispute, and whether he did purchase the same as an agent or trustee for the complainants.

1. Upon the first question, we have the testimony of the three arbitrators, who swear that the plat of survey made by Anderson affixed to complainants' testimony, was the one that was before them at the time of the arbitration, and that the road as therein surveyed was the one which they specified in their award as the "*Road.*" We, then, have a marked and distinct boundary of the land in dispute between the complainants and Russell, the defendant, established by *three* witnesses. Is this not sufficient on this point ?

2. As to the second question, the answer of Conger, de-

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fondant, admits that he entered the said land at the land sales with money furnished by the said parties—that he acted as agent or trustee in the matter. But is it true that Russell, the defendant, furnished any money at the land sales for the purchase of the twenty-four acres which had been awarded to the complainants? Not one cent did he furnish for that purpose, as is conclusively proven by his own testimony and exhibits. Conger, the defendant, in the first place receipts to F. J. Lode, March 15th, 1847, for \$30.25, for the entry of part of the S. W. $\frac{1}{4}$ of Sec. 31, town. 88, range 3 east of the 5th Meridian, which would pay for the land in dispute, according to the survey of Anderson and the boundary established by the arbitrators. That Russell did not advance the money for this land previous to the land sales, is plain from the receipt of Conger to Russell appended to defendants' testimony, as admitted, dated July 2d, 1847, which sets forth, "Received of Isaac Russell twenty-eight dollars fifty cents, it being money to apply on land which is now in dispute between him and F. J. and G. F. Lode." If this money had been paid for the purchase of the land at the time of the sale by the government, as averred by Russell and Conger, why does Russell pay it again on the second day of July, after the sale of the lands had taken place?

That the complainants, or one of them, advanced the money to Conger for the purpose of purchasing the land in dispute, cannot be controverted. Conger tells Lode at the time of the land sales in Dubuque, "not to be uneasy, as he should deed or convey according to the decision of the arbitrators." That Conger stood as trustee to the fund thus advanced, is admitted by the answer, and proven; and "it seems to be settled, that if the purchaser confess in his answer, or in writing under his hand, that the money laid out was the money of the person claiming the benefit of the purchase, it is sufficient to establish a resulting trust." 2 Washington's C. C. R. 445.

Neither Russell nor Conger pretend that Conger purchased the land in dispute for himself, or with his own money.

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That Conger purchased the land of the government, is beyond all question, and that he used the money furnished for that purpose by F. J. Lode, one of the complainants, is, we think, well established; and even without any testimony, we contend that as Conger, the defendant, neither admits nor denies the direct charge in the petition, that he, with the money of the complainants, purchased of the United States the said land in dispute, that the charge is admitted to be true, as it is settled, "If the bill charges a fact to be within the knowledge of defendant, or what may be presumed to be so, and the answer is silent to it, it will be taken as admitted." *Moore v. Lockett*, 2 Bibb, 69; *Kennedy v. Meredith*, 3 Bibb, 466; *Pearson v. Meaux*, 3 Marsh, 6; 1 ib. 336.

We have thus established the arbitration, the award, the line of division between complainants and Russell to be as by Anderson's survey, the fact that complainants paid to Conger the \$30.25, for the purpose of purchasing the lands of the government, and that it was purchased with that money by him, as agent or trustee.

Russell, the defendant, contends that the award of the arbitrators did not settle the boundary as to the road, and that there was still a dispute as to the same at the time of the land sales, &c., and that afterwards it was agreed by the parties, that one Guy H. Carleton should make a survey of said road, according to the original notes of the record of survey, and that the deeds from Conger were to be made in accordance with said survey.

The court will bear in mind that these matters are in *avoidance*, and must be proved by the defence, 1 Bibb, 195; 2 John. Ch. R. 89.

For the purpose of establishing these things, the defence introduced Carleton and Thomas R. Brasure. Carleton states that the survey made by him "was to be an end of the matter." Upon cross-examination he states that he does not recollect "whether it was agreed to be final or not, but that this was his understanding." That this survey was to

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be final is disproved by Maloney and Killam. Maloney swears that at the commencement of the survey, "Mr. Lode said that he would abide by the survey of Mr. Carleton if it was correct, and that at the time that Mr. Carleton made the survey, the Messrs. Lodes were contending for the road as laid out by the original survey, and as actually laid out by the commissioners." Killam swears that "at the time Mr. Carleton made the survey, Mr. Lode said that he would abide the survey, 'if the field notes were right,' and protested before the survey was concluded, that it was wrong, and that no other surveyor ever took the route that" he, Carleton did. That no one ever did or ought to have taken that route, for the Dubuque and Davenport road, is proven by the testimony of Foley, one of the commissioners under the law to lay out said road, and by the survey of John G. McDonald, as made by him at the time the road was laid off. There is nothing in the testimony to show that the complainants were to be bound by the survey of Carleton, or that the deeds from Conger were to be made in accordance with said survey. The defence have therefore wholly failed to prove those matters in avoidance, which they have set up. All that the complainants ask or ever have asked in this matter, is that they may have the land awarded to them by the arbitrators, up to the Dubuque and Davenport road, as they purchased of Maloney, and where that road was actually run by the commissioners appointed to lay off the same, and to which they are entitled by the clearest rules of law and equity.

Opinion by GREENE, J. The defendants in error filed their bill in chancery for the specific performance of a contract to convey certain real estate. The bill charges that in July, 1846, the complainants purchased a claim to a quantity of land from Patrick Maloney, including all that portion of the east half of the south-west quarter of section 31, in T. 88, N. R. 3 east, which lies west of, and is bounded on the east by, the Dubuque and Davenport road; that in the month

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of February following, one of the defendants, Isaac Russell, set up a claim to part of said land, and the dispute was, by mutual agreement, referred to arbitrators, whose award in the premises was to be final and binding upon the parties; that the arbitrators awarded all of the land lying west of said road to the complainants; that subsequently, and previous to the land sales in the spring of 1847, they entered into an arrangement with Patrick H. Conger, by which he agreed to purchase the said portion of land at the sales, in his name, for their use and benefit, and immediately after the purchase from government, to convey the same to them; that they, or one of them for both, furnished said Conger, at the time of the arrangement, with the entrance money, and thereupon obtained from him a receipt in the words following:

“Dubuque, March 15, 1847.

“Received of J. F. Lode thirty dollars and twenty-five cents, cash, for the entry of his part of E. $\frac{1}{4}$ of the S.W. $\frac{1}{4}$ of section 31, T. 88, range 3 east of 5 mer.

P. H. CONGER.”

The bill also alleges that Conger took upon himself the trust, and purchased the land at the sales with the funds furnished by complainants; that they demanded of Conger a deed for the same, which was refused, and that he subsequently conveyed the land to said Russell.

The facts set forth in the bill are mostly admitted by the respective answers of Russell and Conger, excepting the course and location of the Dubuque and Davenport road; and this is the principal question involved in the case. It is in no way denied that this road constitutes the true boundary line between the land of the complainants and that of the defendant, Russell. We have before us three different plats and surveys of the road, as referred to in the answers and depositions. The survey made by G. H. Carleton leaves less than half an acre of the *eighty* in dispute, west of the road, and over seventy-nine and a half acres east of it. This

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survey, it is claimed, was made from the recorded plat of the road that Conger conveyed to Russell, all the land east of the road, as surveyed by Carleton, and that this conveyance was in accordance to the award of the arbitrators, which determined the land east of the road to be Russell's, and that west of it to be the Lodes'. But the other two surveys, made by D. Higbee and A. Anderson, vary most materially from the Carleton survey; Higbee's leaving twenty-seven and a half acres, and Anderson's leaving twenty-four and one-fifth acres of the land west of the road. The testimony of the three arbitrators shows that the plat of Anderson's survey was before them at the time they made the award in the dispute between the claimants and Russell, and that they were guided by Anderson's survey and plat in making their decision; awarding all of the land in the *eighty* that lay west of the road, as surveyed by him, to the Lodes, and the land east of the said road to Russell.

But it is claimed for the defendants, that the award of the arbitrators did not settle the location of the road; that it had been and still was in dispute, at the time Carleton made his survey, and that just before it was made, complainants agreed to be governed by it. To support these positions, the evidence of Carleton and Brasure is introduced. And they testify, that they so understood and supposed the facts to be; but their information in the matter appears so illegitimate, their views so indefinite, and their terms so hypothetical, that we can by no means regard them as satisfactory or conclusive. That this survey was not considered final and binding by the parties, is conclusively proved by the testimony of Maloney and Killam. Maloney swears that the complainants, at the commencement of the survey, declared their willingness to abide by it if correct, and that during its progress they were contending for the original survey, as laid out by the locating commissioners. Killam swears, that at the time Carleton made the survey, the complainants protested that it was wrong, and that no other surveyor ever took the same route. John Foley, one of the locating com-

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missioners, and J. G. McDonald, the locating surveyor, prove that Carleton's survey was not made according to the original survey and location of the road, while their testimony, with that of Maloney and other witnesses, recognizes the Anderson survey, as being regulated by the original location and usual travel of the road. P. Maloney also testifies, that when he conveyed to the Lodes, the road ran as represented by Anderson's survey. The evidence on this point is too conclusive to admit of a rational doubt. The understanding of the parties, prior and subsequent to the award,—the survey of the road by Anderson, as it was travelled and generally recognized,—with the fact that his survey was before the arbitrators, and that they took it as the data and boundary for their decision, even aside from the satisfactory testimony of Maloney, fully sustain the equity of the bill, and clearly establish the right of the complainant to the land in question.

The question raised, as to the agency and liability of the defendant, Conger, needs no elucidation. His answer admits that he entered the land with money furnished by the parties, "and that he acted as agent or trustee in the matter." It appears by the evidence and exhibits in the case, that complainants furnished Conger with the necessary entrance money, previous to the land sales; while an exhibited right from Conger to Russell shows that Russell did not pay Conger any money on the land in question, till several months after the sales, and even subsequent to the survey made by Carleton. The twenty-four acres of land west of the road were unquestionably purchased with the funds furnished by the Lodes; and it is equally undeniable, that Conger stood as trustee of the funds so advanced, with the understanding and agreement, that he was to convey to the complainants the quantity, with the boundaries as determined by the award of the arbitrators. A resulting trust is too clearly established to admit of doubt; and no principle of justice, no rule in equity, can exclude the complainants from the benefit of a purchase which their own funds secured.

The decree of the district court is affirmed.

A P P E N D I X .

DISTRICT COURT OF LEE COUNTY,

NOVEMBER TERM, 1848.

BEFORE OLNEY, JUDGE.

TELFORD v. BARNEY.¹

LANDS not under Indian government, but held by individual Indians as tenants in common, are subject to the jurisdiction of the state or territory in which they lie.

The Half-Breed Tract, after Congress released the reversion to the half-breeds, became subject to the jurisdiction of Iowa; and the partition made in 1841 by the territorial court, is valid, and is conclusive evidence against all persons, of legal title in those to whom the shares were allotted.

Partition under the act of 1839, is not the severance of an actual possession, but of the title in the abstract, and binds the parties by estoppel, and proves title *prima facie* against strangers.

A court of general jurisdiction is one which has the powers that are not withheld, and a cause not shown by the record to be out of its jurisdiction, is presumed to have been within it.

A court of special jurisdiction is one which has only the powers conferred, and a cause is presumed to have been out of its jurisdiction, which is not shown by the record to be within it.

If, by presumption or averment, the cause appears to be one which the court had power to decide, the decision, however illegal, is valid until reversed, and those on whom it professes to operate, are presumed to have had due notice by writ or publication, unless the contrary appears.

(¹) This case was reported by a member of the bar in Lee county; and is inserted as an appendix to this volume, by request of several members of the profession.

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The probate of a will on the testimony of one witness, whilst the statute requires two, is valid until reversed.

A judgment assented to is not a mere contract *in pais*, especially if consent be merely superadded to actual adjudication.

Uncertainty in pleading is cured by a certain judgment, if the allegations open the door to the necessary proof.

A trustee of the legal title may convey by agent, though an agent to convey title held by another, must act in person.

The statute does not dispense with proof of an agent's power to convey land.

Title under a fraudulent judgment is good to an innocent purchaser.

Can a judgment be impeached collaterally for fraud? Not in Iowa since *Webster v. Reid*, 1 Iowa R. 467.

The decisions of the territorial Supreme Court, are binding on the District Courts of the State.

This was an action of right, (ejectment,) for 160 acres of land, parcel of the "Half-Breed Tract."

The Sac and Fox Indians ceded to the United States in 1824, "all their lands in Missouri," by metes and bounds which included a small tract in Iowa between the Mississippi and Des Moines rivers, "it being understood that the small tract between the rivers, &c., is intended for the use of the half-breeds, &c., to be held by them as other Indian lands are held."

In 1832 the Sacs and Foxes ceded their lands in Iowa adjoining the tract, and removed west. In 1834 Congress relinquished the reversion in the tract to the half-breeds, "with full power and authority to transfer their portions thereof by sale, devise, or descent, according to the laws of the state of Missouri.

In 1841 the tract was partitioned by this court, and this lot was set off to Marsh Lee and Delevan, who conveyed to the plaintiff's testator.

The statute under which the partition was made, is sufficiently set out in the opinion of the court. The record of the petition is very voluminous, and shows the following facts:—Josiah Spalding and others filed their petition, representing "that they have a legal title to, and are seized in fee

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simple of, twenty-three and one-third full shares, and 5135 acres of land in that tract commonly called the "Half-Breed Tract," situate, &c., bounded, &c., and containing one hundred and nineteen thousand acres, more or less, together with one full share and one-sixth of a share in Keokuk, a village situate on said tract;—the particular interests here claimed are as follows: J. S. claims one-half of a full share under Margaret Antaya, a half-breed, &c.,—defining the claim of each, and its derivation, "and that Euphrosine Antaya," and others by name, "their heirs and assigns, and other persons whose names and places of residence are unknown to your petitioners, are tenants in common with your petitioners in said premises." The petition was sworn to by the plaintiff's attorney, as true to the best of his knowledge and belief.

A summons to the defendants named was returned "not found," and "notice as the law directs" was ordered, and was published in one paper twelve weeks, at Burlington; "that a petition was filed on &c., by &c., against &c., and is now pending, wherein the petitioners pray that partition be made of the following real estate, &c., and the said defendants, *and all other persons interested in the said property*, are requested to appear and answer said petition, on, &c., or the proceedings had in the cause thereafter, will be binding and conclusive on them forever." The defendants named, except Euphrosine Antaya, and others not named, came in and answered, setting forth their titles, and *by consent*, the court, without a jury, tried the cause, and being *satisfied by sufficient proof* that the publications required by the act had been duly made, and no other persons appearing or making any claim or objection, and *the claims, proofs and conveyances of all the parties being heard and considered*, adjudged, *by virtue of its authority under the statute, and with the consent of the parties*, that the shares were one hundred and one, that Marsh Lee and Delevan, trustees, &c., under articles, &c., exhibited with their answers, were entitled to forty-one shares, &c., defining the rights of the parties. Partition was ordered to be made accordingly, upon

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the basis of a *plat agreed on by the parties*, and it was declared that all other persons were barred from claiming title in the lands. The partitioners departed from the plat where that departed from the truth, and divided the land as they found it on the ground, including islands not on the plat.

The report was confirmed upon argument, an error in the number of shares being corrected *by consent*, and the shares were allotted by ballot, and the partition and allotment were adjudged and decreed to be firm and effectual forever.

The plaintiff having read the treaty of 1824, and the act of 1834, offered the record of the partition. The defendant objected, that,

1. The court had not jurisdiction to make the partition.
2. It is not evidence against the defendant, a stranger.
3. It is not evidence of legal title.

These, and some incidental questions, were argued at great length by *J. C. Hall* and *Cyrus Walker* for the plaintiff, and *George C. Dixon* for the defendant.

BY THE COURT. On the question of jurisdiction, several points have been made. The first is, that this was *Indian* land, on which the court could not exercise its power to make partition.

The argument is that, by the treaty the half-breeds had the right of possession and governmental jurisdiction, and the act of release added the fee and the right of alienation; that there is no evidence that they had aliened when this partition was made; and that, had they done so, any or all of them, jurisdiction remained though title departed from them, and therefore, without regard to title, the land was Indian land.

Indian land possesses no intrinsic quality, distinguishing it from *domesticated* land, and enabling it to repel the jurisdiction of civilized people. An Indian tribe, or other political community or nation, cannot, on becoming extinct, or on abandoning its territory, leave behind it, adhering to the land, a thing called *jurisdiction*, capable of excluding other

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jurisdictions from the vacant territory. Much less could this be effected by an *imaginary* tribe, having no existence *in fact*.

This tract was within the territory of Iowa, and unless jurisdiction of it actually belonged to some other existing political community, it belonged to Iowa. The right to govern it was not in the Sacs and Foxes. They had parted with that right by the treaty of cession. By that treaty they ceded all their lands in Missouri, embraced in specified limits. If it be said this land was not in Missouri, the answer is, the metes and bounds included it, and these must prevail. It was not *reserved* for the use of the half-breeds, but *granted* for their use. The Indians say to the United States, we give you so much land—this for you, that for the half-breeds. They parted with all their rights—possessory title and political jurisdiction. The right to occupy went to the half-breeds. The right to govern went somewhere, either to them or to the United States. It could not go to the half-breeds unless they were, or should become a political community. That they *might*, by assuming that character, have clothed themselves with jurisdiction of their territory is not material, unless they really assumed that character. It is not material what answer the treaty alone would give to the question of jurisdiction, for it does not stand alone. Ten years after, when the Indians had ceded their contiguous lands, and with them had migrated many of the half-breeds, leaving a few females who had married white men, and a few drunken vagrants to annoy the whites, who were beginning to occupy the tract as well as the ceded land, and when no semblance of a half-breed community existed, or could be constructed of the remaining materials, Congress, in view of these circumstances, released to them the fee in reversion and the right of pre-emption, severed their joint tenancy, invested them individually, their heirs and assigns, as tenants in common, with the allodial fee simple, and prescribed the rules of alienation and descent, instead of leaving that matter to their own municipal regulations. The intent of congress to place

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this land on a footing with other lands to which the Indian title and sovereignty had been extinguished, could hardly be made more manifest by express words. The act treats the half-breeds, not as a people competent to govern, but as natural persons, subject to our national government. They needed laws and congress gave them laws, expecting the land, by operation of these laws, to find its way into the common mass of real estates, thus discountenancing every idea of Indian jurisdiction. When this partition was made there was not, and at no time since the treaty had been, an existing tribe to govern the tract; the materials for constructing such a tribe were hopelessly scattered and lost; congress, in whom was the sovereign power, had declared them mere individuals, requiring other law-givers than themselves; the land had lost its distinguishing marks, and Wisconsin and Iowa successively had exercised over it legislation, adjudication, and administration, without question or doubt of right; it was occupied by whites, who had mostly possessed themselves of the titles in common tenancy, and had spotted it over with farms and villages, and had done and suffered such innumerable acts of civil and criminal jurisdiction as if now held void, would bring upon a community of thousands, chaos of rights and ruinous calamities. And to what good? To protect from wrongful encroachment the rightful jurisdiction of a political community which never existed, and whose future existence had been in effect prohibited by Congress, and had ceased to be possible in fact. But how do we know these facts? The court knows the territorial limits of its own jurisdiction, and if deforced from a part of its county so pre-occupied, it will look into the current history for the facts which work the exclusion.

Stress is laid upon the fact, that the act of release authorized transfers of title according to the laws of Missouri. It is urged that if congress designed the land to fall under the jurisdiction of the territory of Michigan, since Wisconsin, finally Iowa, it would have left it to the operation of the laws of that territory. The officers and organized

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counties of Missouri were probably most accessible; but whatever may have occasioned this singular provision, its terms can be satisfied by treating it as a personal privilege to the half-breeds, instead of a permanent incident to the land. So applied, it may have been a convenient, and is now a harmless provision, and loses its force as an argument against our jurisdiction.

The practical exposition of this subject by the several governments and by the community, received the sanction of the Supreme Court, in *Webster v. Reid*, 1 Iowa R. 467, and whatever view this court might have taken of the merits of the question, which have been examined out of respect to counsel who have labored it so confidently, that case must have furnished the law for this.

But it was not enough that the land could be partitioned. The court must have been called upon by a *case presented* to exert its partitioning power; for it could not undertake the business upon its own motion. It is said that no such case was made, and that the proceedings were *coram non judice* and void.

The petition described the land with certainty, averred that the parties owned it in common, and asked to have it divided among them, the parties came into court, brought in the subject matter, and asked the court to act, and the court acted. It matters not that it should have acted otherwise. Had it power to act at all? Could it have sustained a demurrer to the petition and given judgment for the defendants? This cannot be doubted. And this power is jurisdiction of the *case*. The petition truly was uncertain in that it did not give the *ratio* of each plaintiff's interest to the whole, and each defendant's also, or aver ignorance of it. But if demurred to, it might have been amended to more particularity, or to some excuse for its absence. The door was open to all evidence of title that could be found. Perhaps it appeared upon the trial that

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the half-breeds were scattered among the Indians and whites, and could not be traced in their wanderings nor identified when found; that after the act of release they were sought by sharpers and induced to convey many times in succession, and these titles, good and bad, were hawked about, and fell into the hands of non-residents, until confusion had become so utterly confounded, that how many, and who were owners, and what were their relative rights, baffled human means to ascertain. From all the light the court could get it found the number of half-breeds to have been one hundred and one when their joint estate was severed and made a tenancy in common, and that these one hundred and one shares had become and were the property of the persons named in the judgment, in the ratios there stated; and this finding reduced the matter to certainty, and closed the door against objection on that ground. Who shall be deemed parties to the judgment is not now the inquiry. There *were* parties before the court, and the land was divided among them. Is the judgment valid as to them, and evidence of title in them until other owners shall be found?

And, first, is it good between the parties? May those who came in and took land by the judgment rebel against it as a nullity and disturb each other without resorting to a writ of error? To state the question is to answer it.

The second question is hardly more difficult. It is evidence of *title*.

Joint tenants and tenants in common, *entitled* to possession, may have partition. Seizin in fact, or, at the least, freedom from adverse possession, necessary at the common law to support the writ of partition, or to authorize partition under the New York act of 1813, (9 Cow. R. 530,) is not necessary under our statute. Neither is the judgment followed by a writ of possession, but the several owners, if deforced from their separate parcels, must bring possessory actions. How, then, is it the mere severance of an actual

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possession, when possession is neither a requisite nor result? Title is the basis of the action. The right of partition and right of entry are alike the offspring and coincidents of title, and alike are barred in defence by the statute of limitations. Title being the question, both plaintiffs and defendants are required to exhibit their *proofs* of title, though not denied, and to file their title deeds or exemplifications of them, and unless these establish title they cannot have partition. If partition is ordered, made, reported, and confirmed, "judgment shall thereon be rendered that such partition shall be firm and effectual forever." Partition of *what*, if not of the *title in the abstract*, which alone was involved in the inquiry? If all parties interested are summoned, or notified by publication, this judgment shall be binding and conclusive upon all persons whatsoever. Conclusive of *what*, if not of the *title* which alone was partitioned? If not susceptible of division without injury, the property is sold and the money divided, and all are barred who were summoned or notified. Barred of *what*, if not from claiming title against the conveyance? It is declared to supersede and abolish the writ of partition and the bill for partition, and is to be proceeded in as a personal action and reviewed on a writ of error. It is a statutory action *sui generis*—a personal action of law with chancery powers—resembling the proceedings by libel and answer, under the civil law, more nearly than anything known at Westminster, and may be called the *action of partition*. It gathers up, and binds as with a band, all prior titles, and becomes the radiating point of all subsequent titles. Behind it no investigation can be had by those who were summoned or notified. It is not a severance of *possession*, but an adjudication upon the *title*, ascertaining, and declaring by record evidence, that here is the title and its incidents seizin in law. The litigation is not *exclusively* between the *parties*, but the court, the *government*, the public, is a party to it. Every claimant must make his proof to the

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court, which is required to *inspect* his title papers, and send him away empty if *they* are not sufficient, though the other claimants should not object, but consent to let him in. The judgment is not only adversary, as between the parties, and binding by estoppel, but as to third persons it is *prima facie* evidence of truth in the nature of a public declaration of the government upon an *ex officio* examination of the facts.

It is not of itself *title*, but *evidence* of title working a bar by estoppel against the parties, and subject, like other evidence *not* working by estoppel, to be rebutted by strangers to the record, by proof that the title is somewhere else; and, as such evidence—*prima facie* or conclusive—it will sustain or defeat an ejectment.

This is a question of construction, arising on the statute, and is aided by authority only so far as like decisions have been made upon similar statutes, as *Clapp v. Bromagham*, 9 Cow. R. 530, 569, and other cases after cited.

Counsel have labored the question whether unknown owners who did not appear, are estopped by the record. That question can only arise when the defendant offers evidence to connect himself with the title behind the record. As the court has been advised that such evidence will be offered, and the question has been elaborately argued with that view, it will be disposed of at this time.

Was this a proper case for publication of notice, and was notice duly published?

The defendant argues that in making partition, or at least in charging unknown owners with constructive notice, the court had but a special statutory authority, to proceed in a specified manner, upon specified precedent conditions, and nothing will be presumed which does not appear; and that the affidavit and publication, as shown by the record, which precludes the presumption of better, are not sufficient to charge those who did not appear, as *parties confessing by default*.

The plaintiff insists that a judgment disposing of all the land, and professing, in terms, to bar all other claimants, pre-

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supposes that the court had given all, known and unknown; for the petition shows there were owners of both classes, an opportunity to assert their rights—presupposes due notice to the world, which need not therefore be spread upon the record; that, therefore, if what appears is insufficient, it must be presumed to have been aided by other proof not stated; and, if not so aided, nor good without such aid, it was held sufficient by the court, and that decision, though clearly against law, is conclusive until reversed.

The first objection is to the affidavit, that it should have been made by the plaintiffs, or by some of them. The petition “shall be verified by affidavit,” and shall set out the interests of all the owners, known and unknown, or aver ignorance of those not set out. If it be intended that the *parties* shall swear to the petition, to hold it otherwise good would be at most but error. It is customary in our legislation, when a party, or other person in particular is to swear, so to require expressly; and customary with our courts when it is not so expressed, to hold an affidavit sufficient if made by any one who knows the facts. The attorney who investigates the titles and prepares the petition, must, as a general rule, be better qualified than any other to swear to it; and this was peculiarly so in the present instance. As to its being of *belief* only, the nature of the case was such that no one but a half-breed could swear to his *own* title, much less to the titles of others. But under our statute the affidavit is not the foundation of an order of publication, but is a requisite formality to the commencement of the suit, against persons either known or unknown. And, “if the petitioners believe it at all probable that there may be joint owners not known and not named in the petition,” or if any defendant named cannot be found, the court may, *on their application*, order notice. The affidavit goes to the formality of the *petition*, and is waived by answering. It is not a condition precedent to an order of publication—that is obtained by *applying*, not by swearing.

It is next objected that the notice was published in one

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paper only, and that perhaps not the nearest, and only twelve weeks, whilst the statute requires twelve in the nearest, and four at the seat of government. The twelve and four, however, are not accumulations of *time*, but designations of the *number of insertions*, which may be contemporaneous. And as to the number of *papers*, that depended on extrinsic facts. Perhaps there was no other nearer or in the territory. It could hardly be necessary to establish newspapers, in order to duplicate the publication.

The sufficiency of the petition, of the affidavit, and of the publication, were questions necessarily before the court for its adjudication; and the court adjudged that the petition presented the case in proper form, that it was a proper case for notice, and that notice was properly published. That court was then more competent to a correct decision of these questions, than this court can now be. Right or wrong they are judicial decisions—decisions on matters *coram judice*—on questions properly before the court—and can only be examined on writ of error.

An examination of a few of the cases which most resemble this, will strengthen this conclusion.

In *Denning v. Corwin*, 11 Wend. R. 467, partition had been made, and a tract assigned to unknown owners, and sold to pay their share of the costs, on execution, to a stranger, and by him conveyed to the plaintiff in partition. To an ejectment by the unknown owners, the partition and sale were opposed in defence; but the plaintiff in ejectment prevailed, on the ground that he was not a party to that partition. The statute authorized the court, not on *application*, but on *affidavit* that the owners were unknown, to order notice. The record was silent as to affidavit, and, it seems, as to publication, for Chief Justice Savage asked, "Should not the record show that it had been made to appear to the court by affidavit, that the owners were unknown to the plaintiffs, and that such notice had actually been given?" *Gallatian v. Cunningham*, 8 Cow. R. 370, was cited in argument, that when a statute requires proof preliminary to an order,

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and *defective* proof is given, it is error; but if *no* proof is given, the matter is *coram non judice*, and the order void. Therefore, as there was no affidavit made, or notice given, the partition was held inoperative against the unknown owners. *Non constat*, had there been in the record a defective affidavit and defective proof of notice, the unknown owners seeking their rights, would have been sent to a court of error.

If it could be established then, that the affidavit to the truth of the petition, under our statute, is a condition precedent to the order of publication, and that the affidavit set forth in the record, and the proof of publication, are defective, *Denning v. Corwin* would prove the partition not void, but erroneous, as to the unknown owners.

In *Foote v. Stevens*, 17 Wend. R. 483, Judge Cowen laid down the rule which the plaintiff claims for this case, that the parties against whom judgment is given shall be presumed to have been regularly brought in, unless the contrary expressly appears, and he avoided denying the authority of *Denning v. Corwin* by saying that, in making partition against unknown owners, the court acted upon a special statutory authority, and not as a court of general jurisdiction. In *Hart v. Seixas*, 21 Wend. R. 40, Judge Bronson seems to regard *Denning v. Corwin* incorrect in holding the partition void rather than erroneous. But in citing it again, in *Bloom v. Burdick*, 1 Hill R. 130, he appears, like Cowen, to place it on the ground of limited jurisdiction.

In the case last mentioned, the plaintiff in ejectment proved title, and the defendant offered as evidence of title in himself, certain probate proceedings, by which the land was sold to pay the debts of the plaintiff's ancestor. The plaintiff attacked the sale by proof that he was an infant, and no guardian was appointed for him to show cause against the sale.

The court held that, under the statute, the infant could be brought in only by guardian, and the want of a guardian expressly appearing, the door was closed against presumption. It was not a case of presumptive jurisdiction of the person.

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but of established want of jurisdiction, which would avoid any record of any court.

Cole v. Hall, 2 Hill R. 625, was like *Denning v. Corwin*, an ejectment, in which the plaintiff proved title and rested. The defendant then offered the record of a partition against unknown owners, and a sheriff's sale of the unknown owners, several part to his own grantor to pay costs of partition. Objection was taken that, "no *proper* affidavit was made nor *any* notice published." Cowen, Judge, overruling the objection, said, "Here was jurisdiction and a judgment,—such matters cannot be inquired into collaterally." The court held that the record need not speak by *averment*, but it should be *presumed* that a proper affidavit was made and notice duly published, and gave judgment for the defendant on his sheriff's deed. It would seem that there was an affidavit of some sort, but not a "proper" one, and so far it is consistent with *Denning v. Corwin*. But there was *no* evidence of *notice* save the presumption, arising from the fact that the court gave judgment for partition and costs against the unknown owners.

Can *Cole v. Hall* and *Denning v. Corwin* both be right? The latter went on the want of affidavit—perhaps notice was actually published, for no objection was raised on that point. Notice is the writ,—substituted because process cannot be served. The defendant cannot be put off with less, the affidavit proves he could have no more. Can one record be void because it does not show the defendant's right reduced to the minimum, and another valid which does not show that even that was granted him? Is a party, whose rights have been adjudicated without notice, benefitted by learning from the record the means by which he should have been informed? What matter as to the *kind* of writ if *none* were used? Yet the former case held a record void because it did not show that publication was the proper writ, and the latter held another valid which did not show that this or any other was in fact employed. The former had been often questioned and evaded, by the latter it was disregarded,—perhaps overlooked.

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Its utmost influence can only hold the question open in that state, whether silence as to affidavit, or notice, or both, converts the record into a nullity.

Voohres v. Bank U. S., 10 Pet. R. 449, was ejectment on title derived through sale on attachment, defended against for want of affidavit and publication of notice. The court, per Baldwin, Judge, admitted that these did not appear of record, and that they were conditions precedent to the condemnation of the land, but held the record valid and the title good, on the ground that the court having had power to condemn land of absent debtors, affidavit of non-residence and publication of notice should be presumed. Counsel pressed upon the court the distinction suggested by Judge Cowen, as a means of supporting *Denning v. Corwin*, that this was a harsh summary proceeding to condemn a party unheard, in which the court had only special powers, particularly defined by statute to be exercised against common law and common right, on certain specified precedent conditions, and therefore the court had *quoad hoc*, but a special and limited jurisdiction. The court took no notice of the distinction, but placed all *judicial* acts of a court of *general* jurisdiction on the same footing as to the presumption of jurisdiction facts when *collaterally* questioned. This is the tone of all the cases in that court, from *Kemp v. Kennedy*, 5 Cranch R. 173, down to *Grignon v. Astor*, 2 Howard R. 319, and is not only the most reasonable doctrine, but the one best supported by the decisions of the leading courts in this country and in England, as appears by the cases cited at the bar, and not necessary here to be further reviewed.

But in this record there is more than silence, there is an affidavit, either good or bad; if affidavit be the basis of notice and publication, with which the court was satisfied by sufficient proof. If no more proof than appears can be presumed, and that be insufficient to authorize the judgment, the court should have decided otherwise than it did, but still had *power to decide*. That power,—the power to have decided the other way,—is jurisdiction of the question then be-

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fore the court, as to the sufficiency of the affidavit and notice. If the exercise of that jurisdiction produced the wrong result, that result is none the less a judgment for being erroneous.

If the partitioners did not pursue the judgment, *Shriver v. Lynn*, 2 How. R. 43, does not prove the judgment of confirmation void, for here the cause and the parties were still before the court, whilst there the cause had been disposed of and the parties dismissed. Finally it is agreed that this judgment was the offspring, not of judicial inquiry, but of the mutual consent of the parties, and this fact appearing, a court of law must see it, and treat the record as a contract in *pais*—a deed of mutual releases, possessing no efficacy as evidence against strangers, without proof of anterior title.

Had the record shown unequivocally that the court did *not* inquire, but that the parties settled by agreement the facts and resulting rights, and the judgment was recorded as a merely *clerical* act, it might have become necessary to decide the question presented. But the record avers that "the claims of the parties, and their respective proofs and conveyances being by the court heard and considered," it was, "by the consideration of the court, by virtue of its authority under the statute, *and* with the consent of the parties," adjudged. The court *did* inquire, and *did* find the facts, and *did* settle the rights, and *did* award the land according to the rights resulting from the facts found by the inquiry. The "and with" *professes* but to *add* consent to *judicial decision*. If it operates to waive error, as to those consenting, that is the limit of its power. It detracts nothing from the efficacy of the work wrought by the active exercise of the judicial mind. For the judgment of confirmation, consent alone might have sufficed, for none but those consenting could be affected: the rights being fixed, others could have no interest in the mode of actual division. Yet even that judgment came from the mind of the court after argument *pro* and *con*. The remaining consents went to the waiving of a jury to try the titles, which the statute permits, and to the correction of

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a mistake in the number of shares, and perhaps to other matters of mere proceedings. Therefore, it is held,

1. That the power of the court to make partition could be exerted on this land.
2. That this jurisdiction actually attached by means of a proper case.
3. That the judgment is adversary and evidence of a legal title.
4. That all persons were made parties and are estopped by the record.

The plaintiff having read the record, offered the deed of Marsh, Lee and Delevan, made by the agent. The defendant objected that the agent's power must first be proved. The plaintiff insisted that the deed, being acknowledged and recorded, might be read "without further proof," under the statute of conveyances, Sec. 34. The court sustained the objection, remarking that the officer merely certified, that the claiming to act for the grantor acknowledged the execution. He is not made judge of the supposed agent's authority, and if no proof of such authority is now to be given, one's land is at the disposal of any person conveying it as agent, *without* authority. The evidence of his power is the letter of attorney. That is recorded, and thus preserved and made accessible, because it is an indispensable instrument of evidence, preliminary to the introduction of the deed.

The letter of attorney and deed being offered, the defendant objected that the grantors were trustees under articles already in evidence which contain no authority to convey, and particularly by agent, and cited 4 Johns. Ch. R. 368; 1 McLean R. 199.

By THE COURT. The cases cited are not in point—not cases of title held in trust, but of powers to sell land of which the legal title was in others,—mere agencies. These articles of association authorized the trustees to possess themselves

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of the legal title, which they did by the judgment of partition, if not before, and also to sell a limited quantity, and divide the residue. This conveyance is not *prima facie* a breach of trust, and, if it were, a court of law would hardly notice it. With the legal title resides the power of alienation, and, at law, alienation *sui juris*, which includes the power of appointing an agent.

The plaintiff having read the deed, offered the will of the grantee, devising to him the land. The defendant objected that the record proved it to have been admitted to probate on the testimony of one witness.

BY THE COURT. Only that which gives the court jurisdiction of the case need be averred in the record to support the judgment or decision. When the court appears to have had jurisdiction, its acts done in the *exercise* of that jurisdiction are presumed to be correct, and if the contrary expressly appears it is but error. And this rule is universal as to all *judicial* acts, whatever *dicta* or *decisions* may be found to the contrary, and that without regard to the character of the tribunal whose record it is, whether it have jurisdiction generally of all matters not prohibited, or specially of only those expressly given.

The probate court is of limited jurisdiction in respect to the number and kind of subject matters upon which it may act. But its powers are judicial and plenary over those subjects, though they are *regulated*, as to the mode, by statute. This record is of the probate of a will,—a matter clearly within its jurisdiction,—and stands on the same footing, jurisdiction appearing, as the records of this or any other court. It must therefore be presumed that the heirs assented, or that one witness was dead or absent, so that a single witness filled the statute. But if these facts were expressly negatived by the record, it would only prove that the court ought to have decided the other way, not that it lacked the power of deciding.

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The defendant read the will, and proved the defendant in possession of the land, and rested.

The defendant offered to prove title in himself, derived from a half-breed, and actual possession under that title from before the partition to the present time, and that the partition was fraudulently obtained, without the proof of title required by the statute; to which the plaintiff objected.

BY THE COURT. If there was fraud, it was the fraud of the court in making a false record, for the record avers the fact now denied, or the fraud of the parties in imposing false proof upon the court. In whatever it may consist, is it admissible in evidence in this suit, to defeat the plaintiff's title, derived through the fraudulent judgment? Could it be admitted even against a party to the fraud? 8 Ohio R. 108; 22 Maine R. 130. Not in this state, certainly, since *Webster v. Reid*, Morris 467. Even on a bill in chancery for the express purpose, giving the party accused the right of explanation or denial, notice of the fraud must be brought home to all the subsequent purchasers. This is not proposed; therefore, if the fraud could be inquired of, it could not affect the plaintiff's title.

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2. Declarations, by an agent of limited powers, not made at the time, nor respecting the subject matter in controversy, cannot bind the principal, especially where those declarations were of a vague, indefinite character, and in conflict with testimony of a higher and more direct character. *ib*
3. Where an agent makes a contract in his own name, he cannot, after his principal refuses to ratify it, make him responsible by changing the contract, in signing his name as principal and his own as agent. *ib*

See EQUITY, 10.

EVIDENCE, 23.

AGREEMENT.

1. Where a party, having it in his power, cancels a contract or declares it void, he should restore the other party to his former right, by repayment of money or return of property received on such contract; and in failing to do so, he is liable to an action without a previous demand. *Penny v. Cameron*, 380
2. Where F. had delivered to D. two flat-boats on a contract previously made, D. proved that they were not delivered at the time, and were not of the quality required by the contract, and that he had incurred expenses in making the necessary repairs upon them; and then proposed proving that he had sustained damage by loading the boats with produce, which was injured in consequence of their defective construction, and also that he had sustained damage by depreciation in produce, by not having the boats in time; it was held that the facts proposed to be proved, were too remote and contingent to become the subject of damages under the contract; held also, that as D. received the boats, he was bound to pay whatever they were worth, and that he could not

set up subsequent losses, growing out of the use to which he applied them. *Davis v. Fish*, 406

3. The act of accepting the boats without complaint, and appropriating them to use, furnishes strong presumption of a waiver of all objection to their defective construction and delay in delivery. *ib*
4. Though work is improperly performed, and not within the agreed time, still if it is of use and value to the employer, the workman may recover reasonable compensation, after making such allowance as the circumstances may require. *ib*
5. If in such case, the employer can protect himself from damage by reason of defective or dilatory work, he is bound to do so if practicable at a moderate expense, or by ordinary efforts; and he can then charge the delinquent party for such expense and efforts, and the damages which could not be avoided by such diligence. *ib*
6. Where F. conveyed a claim and improvements to D., for one hundred and fifty dollars on account, and also for a steam engine of particular specification, but which was not delivered by D. to F. at the time and place agreed upon; it was held that as D. failed to deliver the engine as agreed, F. was entitled to the amount at its estimated value, that it would have paid, had it been delivered; but if no value was estimated upon it by the parties, that F. was entitled to the value of the claim over and above the \$150 applied on account. *ib*
7. Where T. agreed to buy a horse of J., and to pay him \$50 in specie for it on the following Monday, at which time the horse was to be delivered; and to secure the sale, deposited \$15 in bank bills with J., which he subsequently returned to T., with the understanding that if the purchase should not be completed within the stated time, J. should be at liberty to sell the horse to any other person; it was held that, as there was no written memorandum of the agreement, no earnest money paid nor delivery of the horse, J. could not recover the \$15 which he had returned to T. *Jones v. Taylor*, 434

See ATTORNEYS, 1.
EQUITY, 1, 2, 3, 6, 10.
BOUNDARIES, 3.
EVIDENCE, 21.

AMENDMENT.

1. Applications to amend pleadings should always be allowed when the tendency is to advance justice; and especially when the amendment contemplated is to narrow down, and not to extend the allegations. *Wilson v. Johnson*, 147
2. It being a matter of discretion with the court to allow or refuse an amendment, except in cases authorized by statute, it cannot ordinarily be made the ground of error. *ib*
3. The Iowa statutes of jeofails not obsolete, and extend explicitly even to material defects, after verdict. *Humphreys v. Daggs*, 436

See TRANSCRIPT.

APPEAL.

See PRACTICE, 1.

APPEARANCE.

See PRACTICE, 25.

ATTACHMENTS.

1. In a proceeding by attachment, under the statute, when the defendant has not been served with process, the judgment should be *in rem* only, and not *in personam*. *Bretney v. Jones*, 366
2. Objections to the sufficiency of an attachment bond are cured by statute, on filing a sufficient bond within a reasonable time after the objections are raised, but such objections cannot be originally urged in the supreme court. *ib*
3. A substantial compliance with the statute is sufficient in notifying an

absent debtor of attachment proceedings against his goods, if the requisite notice is published within thirty days after the advertisement is delivered to the plaintiff. *ib*

4. Though the statute regulating proceedings *in rem* should be strictly pursued, still the strictness should not be such as to suspend the law, and leave the attaching creditor remediless. *ib*
5. An attachment should not be dismissed on the ground of a defective affidavit, if the defect is corrected by amendment. *Graves v. Cole*, 406
6. Orders to dissolve an attachment, and also to amend the defect for which it is dissolved, are not consistent. *ib*

See LIEN.

ATTORNEY.

1. A contract with an attorney, to attend to a suit in the district court alone, does not authorize him, without further authority, to take the cause to the supreme court; nor can he recover compensation for services, in the supreme court, without showing that he was employed to render the service, or was in some way recognized by his client as attorney in the suit. *Hopkins v. Mallard*, 117
2. It is a matter of discretion with the county commissioners, to allow or refuse compensation to an attorney, for defending a pauper prisoner, by direction of the district court. *Whicker v. Cedar Co.*, 217
3. When a demand is placed in charge of an attorney to collect without limitation, he is authorized to receive the money after procuring a judgment, and to enter satisfaction. If the client assigned a judgment to a third party, and after the transfer the judgment-debtor paid the same to the attorney of record, it was held that, as the debtor had no notice of the assignment, he should be protected from further liability. *McCarver v. Nealey*, 360
4. An attorney has no right to receive

anything but money in satisfaction of a demand placed in his hands for collection, unless especially authorized to do so by his client. *ib*

5. Prosecuting attorney authorized, by virtue of his office, to follow and conduct a criminal prosecution, commenced within his county, into any other county or court, to which the case may be taken, by change of venue or by writ of error. *State v. Carothers*, 464

6. An attorney of the court, not required to show authority to appear in a case; it will be presumed till the contrary is shown. *ib*

See DEPOSITION, 1.

B

BANK.

1. A bank, in which the stock is owned by individuals, is a private corporation. *Miners' Bank v. United States*, 553
2. Upon a proper showing, a judicial tribunal may vacate the charter of a bank for misuse or abuse, when the legislature does not reserve that power; but if the legislature reserve to themselves the power to repeal a charter or act of incorporation, upon a misuse or abuse of corporate powers, they may do so without the interposition of a judicial tribunal: they are the proper judges of such misuse or abuse; and their acts, their motives, or the sufficiency of evidence before them, cannot be collaterally questioned. It is not the province of the judiciary to determine whether a law is, or is not enacted expediently, or under proper contingencies and motives, and thereupon decide as to its validity. It is their province to place upon laws a legitimate construction, and enforce them so far as they are adjudged constitutional. *ib*

BASTARDY.

1. In an information for bastardy under the statute, it is admissible to

discredit the testimony of the mother, as complaining witness, by disproving what she swore to on the preliminary examination before the justice. *Holmes v. State*, 160

BETTING.

See WAGER.

BILL OF EXCEPTIONS.

1. When exceptions are taken, in relation to any instrument in writing, with a view of bringing the matter before the supreme court, it should be incorporated into the bill of exceptions; but if this is not done, the instrument should be so particularly described and referred to in the bill, as to render its identity conclusive. *Humphrey v. Burge*, 223
2. Where a bill of exceptions came up, without date, was detached from, and not referred to, in the transcript of the record, and nothing to show that exceptions had been taken, it was rejected. *Platner v. Mofford*, 476

BILLS OF EXCHANGE.

See EVIDENCE, 23.

PROMISSORY NOTES, 3, 14, 15.

BOATS.

1. Owners of a steamboat, under the statute, may be sued by name of the boat, but they cannot institute a suit by such name, nor sue out a writ of error. *Steamboat Kentucky v. Hine*, 379
2. A steamboat is liable, under the statute, for the use of a barge. *S. B. Kentucky v. Brooks*, 398

See PLEADINGS, 12.

BOUNDARIES.

1. Where a given number of acres are

sold off of the west side of a quarter section of land, the premises should be surveyed into a parallelogram. *Morris v. Stuart*, 375

2. Where a given number of acres are sold out of a corner of a quarter section of land, the premises should be surveyed into a square. 46

3. Where eighty acres of land were purchased at the land-office by C., in trust, and with the understanding that he should deed to the two claimants, L. and R.; to L., all of said eighty lying west of a certain road, and to R., the residue; and L. furnished C. with the necessary entrance money, for his portion of the land, prior to the purchase; a question arising, between R. and M., in relation to the location of the road, as differently surveyed by three respective surveyors; it was held, that the survey should be recognized, which followed the road as generally travelled, and which had previously marked the boundary between the two claims; and, especially, as such survey constituted the data upon which arbitrators, appointed by mutual consent, had previously awarded the land in dispute to L.; and also held that C., as trustee, was responsible to L. for such portion of the eighty acres of land. *Russell v. Lode*, 566

C

CERTIORARI

1. Where the record of a case is too defective to justify a decision, the court will order a *certiorari* to perfect it, without a motion from counsel. *Porter v. Garrett*, 368

CHANCERY.

See EQUITY.

PLEADINGS. IN EQUITY.
PRACTICE. " "

CHARACTER.

See WITNESS, 1, 2.

CONTINUANCE.

See PRACTICE, 6.

CONTRACT.

See AGREEMENT.

CONVEYANCE.

See DEEDS.

EQUITY, 1.
LIEN.

CORPORATION.

See BANK.

COSTS.

1. A judgment rendered against plaintiffs in the court below, in consequence of their own mismanagement and negligence, was reversed in the supreme court at their costs. *Jones v. Fennimore*, 184

2. Questions in relation to costs should first be adjudicated in the court below on a motion to re-tax. *McGuffie v. Derrina*, 251

3. A question of cost should be first adjudicated in the district court. *Hemphill v. Salladay*, 301

4. By regulation of statute the sheriffs and clerks of the district courts are allowed not exceeding thirty dollars per annum from the county, for services in criminal cases when the party is acquitted; and are not entitled to any other compensation in such cases. Section 1, of the Laws of 1846, p. 1, does not extend to clerks—it applies to witnesses only. *Culbertson v. Jefferson Co.*, 416

5. In an action of tort, commenced in the district court, if the plaintiff recovers less than fifty dollars, he can recover no more cost than damages, and is liable for the balance of the costs accruing in the case. *Britton v. Wright*, 426

6. It will be presumed that costs were properly taxed in the court below until the contrary appears. *Yeager v. Circle*, 438

7. A question, of taxing costs, must first have been acted upon by the court below before it can be legitimately adjudicated by the supreme court. *ib*

8. Costs on an attachment for contempt cannot be awarded in favor of the party against whom the writ issued. *Deeds v. Deeds*, 394

See PROMISSORY NOTES, 1.

COUNTY COMMISSIONERS.

1. The district court is not authorized to direct or command the board of county commissioners to make certain allowances found to be due a party suing the board, but should render judgment for the amount against the commissioners. *Wapello Co. v. Sinnaman*, 413

2. If a creditor is dissatisfied with the allowance made to him by the board of commissioners, he has his election to appeal to the district court, or institute an action at common law against the board. But if a party accepts what is allowed by the commissioners, he should be precluded from recovering anything further, either by appeal or suit at law. *ib*

COUNTY ORDERS.

1. A county order, payable out of a special fund to be created, is not due until the fund is created; and judgment cannot be rendered upon it, unless that fact is established; nor does such an order draw interest before the fund is created. *Brown v. Johnson Co.*, 436

2. A county order, payable on presentment to the treasurer, is due, and draws interest from the date of such presentment. *ib*

COUNTY SEAT.

See PLEADING, 19.

COUNTY TREASURER.

1. The county treasurers not entitled to compensation from the county, for making out a list of school taxes with a statement of taxes paid and unpaid, as required by statute. *Jefferson Co. v. Wollard*, 430

COURTS.

1. The courts will determine, as they are bound and are presumed to know, *ex-officio*, when a law takes effect. *Allen v. Dunham*, 89

2. No original matter not connected with the proceeding, or acted upon by the court below, will be adjudicated in the supreme court. *Doolittle v. Shelton*, 271

3. Though the supreme court may give such a judgment as the district court should have rendered, it will not be done, when the defendant has not had a hearing below. *Doolittle v. Shelton*, 272

4. Decisions of our territorial supreme court will not be disturbed, unless manifestly erroneous. *ib*

5. A term of court, fixed in a county for one week, commencing on Monday, will expire on the following Saturday night at twelve o'clock. *Davis v. Fish*, 406

See COSTS.

EVIDENCE, 3, 7, 8.

JUDGMENTS, 10.

JURISDICTION, 2.

VERDICT, 2.

COVENANT.

1. On 29th June, 1841, J. S. executed a title-bond to R. N., conditioned that he should forward a good title to certain lands on his arrival in Pennsylvania. J. S. died in August, 1841, without making the conveyance required by the bond. N. M. became administrator of the estate of J. S., *ex officio*, as public administrator, on the 16th Nov. 1842, and subsequently H. S. *et al.* were substituted. N. M., as administrator, was

sued on the covenants of the bond on 22d Nov. 1842. *Held*, that no action could be maintained against the administrator at the time suit was brought. *Stewart v. Noble*, 26

2. J. S. having died before breach of covenant in the bond, the proper course for R. N. was to file a bill under the statute for a specific performance. *ib*

See AGREEMENT.

CRIMINAL LAW.

Fine and imprisonment.

1. Under the revised statute, where there is any latitude given as to the amount of the fine, or time of imprisonment, for any offence, it is the exclusive province of the jury to fix the amount of the fine, and of the judge to fix the time of imprisonment, within the limitations prescribed by law. *Cook v. United States*, 56
2. Under the statute of Iowa, it is not sufficient, in a criminal case, to swear the jury "the truth to speak on the issue joined," &c. *Warren v. State*, 106
3. Under the criminal code of Iowa, an accessory before the fact may be indicted and convicted as principal. *Bonsell v. United States*, 111
4. Where there is latitude given by statute as to the amount of the fine for a criminal offence, it is the exclusive province of the jury to fix the amount. *Franks v. State*, 541
5. Where one of two co-defendants is acquitted, it does not necessarily follow that the other should be. *State v. McClintock*, 392

See INDICTMENT.
LARCENY.

D

DAMAGES.

1. As a measure of damages, in an action on a title-bond, it is proper to

follow the value of the land described in the covenant, and that value to be determined by the consideration money and interest. *Stewart v. Noble*, 26

See EVIDENCE, 30.

PRACTICE, 9, 10, 11, 12.

DECREE.

A final decree cannot be changed, altered or reversed, except upon application by bill or petition for cause, to the court which rendered the same, or to an appellate court. *Deeds v. Deeds*, 394

See EQUITY, 9.

DEED.

1. To enable the plaintiff to recover the purchase money paid on a contract for land, after the defendant fails to make conveyance, according to agreement, it is not necessary for him to tender a deed for the defendant to execute, unless expressly required to do so by the terms of the contract. *Query*: Is it necessary in such a case for the plaintiff, or his agent, to demand a deed of the defendant? *Carson v. Lucore*, 33
2. It is not necessary for the plaintiff to prepare a deed for the defendant to execute, before he can sue for a breach of the contract to convey. *Powers v. Bridges*, 235

DEPOSITIONS.

1. The rule of practice, which prohibits the attorney of a party in a case to act as commissioner in taking depositions under a *dedimus*, or to write down the testimony of a witness to be used on the trial of a cause, does not apply when the attorney is himself the witness, and reduces his own evidence to writing. *Burrows v. Goodhue*, 48
2. It is proper for a witness to write his own deposition, and swear to it before the commissioner duly authorized. *ib*

3. In a deposition, the answer of a witness should be substantially responsive to the interrogatories. *McCarver v. Nealey*, 360

E

EJECTMENT.

See VEXATIOUS, 2.

EQUITY.

- 1 Where D. and C. each furnished a moiety of the money to purchase a quarter section of land from the United States, for the benefit of C., and to secure the payment of the money which D. had advanced towards the land, it was purchased in his name in trust for C., and soon after C. died, without having obtained a deed for the land; it was held that the heirs of C. had, in equity, an unquestionable right to the undivided half of the land; but that, as the estate of the deceased was insolvent, it should be subjected to the payment of his just debts. Held, also, that the trust in which D. held the land could not be changed by an averment in his answer, not responsive to the bill; that he had executed a bond to C. after the original purchase of the land, binding himself to deed it to C. upon his paying the amount he had advanced within a stipulated time, or in default forfeit the land; and that it was accordingly forfeited. Held, also, that the conveyance of the land to P., the mother of C., was void, as against his creditors; and she being administratrix of the deceased, at the time of the conveyance to her, that it should be held by her as representative of the estate, and as subject to the demands of creditors, as if owned by the testator at the time of his death. Held, also, that D. and P., having had title to the quarter section of land, and having disposed of one half of it to third persons, the remainder, held by P., should be subject to the claims of creditors and heirs. *Doolittle v. Bridgeman*, 265
- 2 Where B. contracted to sell land to N., and bound himself to convey the title upon the payment of the purchase money, as the respective installments became due; and in case of a failure to pay any installment, when due, reserved the power to ratify or revoke the contract at pleasure. N. entered upon, improved the land, and paid part of the purchase money; but failing to pay the balance at the time stipulated, B. rescinded the contract, and conveyed the land to another. B. filed a bill in equity to recover the consideration money, and compensation for the improvements, without alleging insolvency in B., or fraud in the transaction: it was held that the bill did not confer equity jurisdiction, as it sought compensation and damages without asking for other relief; and also held, as the facts involved showed N. to have an adequate remedy at law, a bill in equity would not lie, and that the demurrer was properly sustained. *Notson v. Barrett*, 302
3. S. set forth in his bill, that S. B. & Co. obtained judgment against him, in February, 1840, for the sum of two hundred and thirty-four dollars, upon which execution was issued, and levied upon eighty acres of his land, which was, in May, 1842, sold to G., as attorney for S. B. & Co. In May, 1844, and some time after the period for redeeming the land had passed, G. conveyed it to C., one of the firm of S. B. & Co. The bill charged that the sale was not duly advertised, and that since the sale, S. had redeemed the land by paying the amount of the judgment to S. B. & Co. The answer of S. B. & Co., duly sworn to, admits the sale of the land as alleged, but denies that it was not legally advertised and properly conducted, and utterly denies that S. had redeemed the land from the sale, or paid one dime towards it; but explains that S. S., the brother of S., had paid to them \$218.28, which was placed to the credit of said S. S. on their books, with the understanding that when he paid the balance of the judgment against S., with the additional sum of about \$400, which they claimed to have against him, they would convey the land to S. S., in trust, for the wife and children of S.; that the sum of \$218.28, was never applied towards redeeming the land, but in 1843 was paid over to the adminis-

- trator of S. S.; that S. was in no way recognized in the transaction, and that the only pay they had received on the judgment was from the sale and purchase of the land through G., their attorney. The deposition of G. supports the answer in many particulars; but the depositions of B. and S. prove an admission from C. that the judgment had been paid off, and that the land would be deeded to S. only upon conditions similar to those set forth in the answer of S. B. & Co. Held, that the admission of C. was too ambiguous to justify the belief that S. had satisfied the judgment, otherwise than by the land which was sold under execution, and that such testimony was not sufficient to overcome the more definite proof by G., and the explicit answer of S. B. & Co. under oath, strengthened by the lapse of time, no proof of effort, and no receipt of payment by S. Held, also, that the understanding with S. S. had been rescinded by his administrator, in demanding and receiving back the funds he had deposited with S. B. & Co. *Smith v. Smith*, 307
4. Where the equities of the second bill are materially different from the first, although the origin of both are the same: Held, the adjudication of the first is no bar to the second. *Morris v. Stuart*, 375
5. A court of equity will not impart force to a defective title, when, by doing so, other persons, having a prior equity in the land, would be injuriously affected. *Lucas v. Barrett*, 510
6. A contract should be just, reasonable, and founded upon a consideration nearly adequate, in order to justify an enforcement by a court of equity. *ib*
7. A court of equity may dissolve a partnership, when difficulties between co-partners are of so serious a nature as to render the continuance of the company impracticable, and injurious to one or both of its members. *Blake v. Dorgan*, 537
8. The fact, that the petitioner for a dissolution of a partnership may have committed the first wrong, affords no excuse for wrongs committed by the other party, and should not prevent a dissolution, when the deportment of such party is hostile to the harmony, prosperity, and continuance of the firm. *ib*
9. Exceptions to the final report of a master in chancery should be first taken in the district court, in order to bring the objection to the supreme court; but where it appears that the court below ordered a just item to be stricken from the account of the appellant, it raises a legitimate question for the action of this court, and will justify a reversal of the decree. *Blake v. Dorgan*, 547
10. Where M. and H. each claimed eighty acres of land, agreeable to original claim lines, and it appearing by preponderance of proof, that H. made an arrangement with M., by which the latter was to purchase the eighty acres at the land sale; that H. offered him a sum of money equal to his portion of it, but M. declined receiving it, saying he had money enough, that he would purchase the land, and call for the money when he wanted it; that M. purchased the land accordingly, in his own name, and H., depending upon the arrangement with him, made valuable improvements upon his portion of it, within the presence and knowledge of M., who had, both before and since the purchase, recognized the right of H., and had expressed a desire to purchase his portion of the eighty acres; and that H. had also tendered the amount of the purchase money, and interest, since the purchase, and before this suit was commenced, with a deed for M. to execute, but he refused to receive the one or execute the other. Held, that as H. had deposited the amount of the purchase money and interest in court for M., that the former was entitled to a decree against the latter, for the portion of the land which he had originally claimed; also, held, that H. was entitled to this recovery, although the facts proved did not fully come up to the facts alleged in his bill; also, held, that the facts established would take the case out of the statute of frauds for the advancement of equity; and also, held, that M. might properly be regarded as

agent or trustee of H. in the transaction. *McCoy v. Hughes*, 370

ERROR.

1. Where the error alleged is not apparent of record, the legal presumption is, that the proceedings in the court below were correct. *Dunham v. Benedict*, 74
2. A case having been once determined in the supreme court, it cannot be brought up a second time, by writ of error. *Davis v. Alexander*, 86
3. Unless the errors assigned appear affirmatively of record, it will be presumed that the proceedings below were correct. *Mackemer v. Benner*, 157
4. The supreme court will entertain no error that does not appear affirmatively of record. *Saun v. Jones Co.*, 165
5. A writ of error may bring up a judgment rendered by default, and extends to all final and interlocutory orders, judgments, and decrees of the district court. *Doolittle v. Shelton*, 271
6. No error will be considered by the supreme court, unless conclusively apparent in the record. *Hemphill v. Salladay*, 301
7. Where the errors below pertain chiefly to a motion for a new trial, the judgment will not be arrested, but a *venire de novo* awarded. *Ray v. State*, 316
8. The statute limiting writs of error to the respective appellate districts, extends to the county in which the trial was had by change of venue, rather than to the county in which the cause originated. *State v. Carothers*, 465
9. A criminal case may be brought to the supreme court by writ of error. *State v. Douglass*, 550

ESTATE.

See EQUITY

JUDGMENT, 2, 3.

EVIDENCE.

1. Documentary.

1. The official certificate, or the testimony of the officer who administered the oath required by law to road-viewers, is more authentic than the mere statement in the report of such viewers, that they had been duly sworn. *Dollarhide v. Muscatine Co.*, 158
2. The record entry of the clerk, under the sanction of the court, is a higher species of evidence than the bill of exceptions. *Cook v. United States*, 56
3. The acts of congress relative to the authentication of public acts, records, and judicial proceedings, have no reference to inferior tribunals, created by municipal law, such as justices of the peace; but they refer to the proceedings of courts possessing general jurisdiction. *Gay v. Lloyd*, 78
4. The method of authenticating the correctness of a justice's transcript, is left to the statutory regulations of the respective states; and should conform to the law of the state in which they are to be adduced in evidence. *ib*
5. Under the statute of Iowa, the certificate that the person making a transcript, was a justice of the peace, as therein stated, should come from the clerk of the county court, under the county seal, and not from the clerk of a court of common pleas; unless the laws of the state from which the transcript is brought, should be produced to show that he was the proper officer to certify the same. *ib*
6. After the correctness of the judgment and the jurisdiction of the justice, are duly established, the same faith and credit are given to them, as is given to the judgment of a court of general jurisdiction. *ib*
7. Where a presiding judge certifies that the attestation of a record made by a deputy clerk, in the name of his principal, is in due form of law, it is sufficient, without going behind the certificate to inquire

whether a deputy has a right to so attest a writ by the laws of his state. It is the office of such a certificate to advise courts of other states that such authentication is in due form of law. *Young v. Thayer*, 196

8. The certificate of a presiding judge in Indiana, relative to proceedings before his predecessor, held to be admissible. *ib*
9. Demand and notice on a foreign bill of exchange may be proved by notarial protest; but on an inland bill, they may be proved by deposition, or oral testimony on trial. *Bernard v. Barry*, 888

2. General Principles.

10. Where testimony is ambiguous, and there is doubt as to its correct application to the facts in question, the promotion of truth, and justice to the witnesses, require that construction which will render it as consistent as possible with the opposing evidence. *Smith v. Smith*, 307
11. Illegal testimony will not vitiate the proceedings, when it is upon a point not properly before the court; and hence a proceeding to foreclose a mortgage, cannot be affected by improper testimony in relation to the note, as the mortgage is the basis of the action. *Wilkerson v. Daniels*, 180
12. Where evidence conduces to prove, even circumstantially or remotely, the question at issue, it should go to the jury. The court is not authorized to decide upon the sufficiency of evidence. *Franks v. State*, 541
13. If evidence is demurred to, or otherwise taken from the jury for the decision of the court, all the facts which it had a tendency to prove must be regarded as admitted by the objecting party; and the court will then decide upon the legal effect only of the facts thus established, proved, admitted, or inferred, and not upon the sufficiency of proof to establish those facts. *ib*

3. Parole.

14. Parole evidence that the defendant examined the transcript of a justice, and acknowledged that the judgment

had been rendered against him by the justice therein named, is admissible, and entitles the transcript to faith and credit; although the defendant did not admit it to be a correct copy of the original record, and declared the judgment to be unjust, but that it had not been paid. Such admission concedes the official character of the justice, and the amount of the judgment. In such an action the justice of the judgment cannot be inquired into. *Gay v. Lloyd*, 78

15. Parole testimony is admissible to explain the inducement and circumstances of a record entry made by mutual consent, where such evidence has no tendency to contradict or vary the record. *Porter v. Sigler*, 261

16. Where the clerk of the district court omitted to make the usual endorsement on arbitration papers left with him to be filed; the testimony of one of the arbitrators is admissible to show that the award had been returned to the clerk, within the time stipulated in the arbitration agreement. *Young v. Duggan*, 152

4. Presumptive.

17. While it will be presumed in law, that a court of general jurisdiction acted within the sphere of its authority, a court of limited and special jurisdiction will be required to show the law conferring the jurisdiction it exercised. *Gay v. Lloyd*, 78
18. It will be presumed that a person in authority has done his duty, until the contrary appears. *Dollarhide v. Muscatine Co.*, 158
19. When a debtor suffers a note to remain in the hands of his creditor, and takes no receipt against it, a strong presumption is raised that it has not been satisfied. *Jones v. Penimore*, 134
20. Nothing appearing in the record to the contrary, it will be presumed that the officer in a replevin suit obtained a bond as required by law, from the plaintiff, before executing the writ. *McGuffie v. Derrine*, 251
21. P. made a note to N., payable in meats, when called for; and on the same day N. executed a writing to

P., agreeing to pay him cash for one half the meat he should purchase, and apply the other half on the note till satisfied; the note was endorsed by N. to H., without recourse, but there was nothing to show that it was negotiated after due. Held to be a presumption of law, that the note was endorsed before due, and that the agreement from N. to P. was no defence to a recovery on the note, and not admissible in evidence. *Patterson v. Hartsock*, 252

5. Miscellaneous.

22. Statements made, not under oath, by a witness relative to the subject matter in controversy, may be admitted on the trial to discredit his testimony; but if such contradictory statements are not supported by other proof, they must yield to his evidence given under oath upon the trial of the cause. *Burrows v. Goodhue*, 48

23. Where W. M., as authorized agent, drew a bill of exchange to the order of P. M., for means furnished his principals, T. & W., in carrying on their business, and appended the word "agent," without stating for whom he was agent, it was held that W. M., on being released from liability to P. M., became a competent witness to prove the nature of the agency transaction; and for that purpose, that letters between him and his principal were admissible. It was also held, that as P. W. advanced the means under circumstances which justified the belief that the principals, T. and W., were responsible, and would pay the amount advanced for their benefit, he might file the bill for cancellation, and recover on the money counts. *Thurston v. Mauro*, 231

24. It is a good defence to an action, if established, that the same subject matter in controversy had been once adjudicated. *George v. Gillespie*, 421

25. Under the statute, failure of consideration or fraud, can be set up as a defence to a promissory note. *ib*

26. The payee had his election either to sue on the note or on the original promise. In an action on the note,

it is admissible to show by the transcript of the record and by parole evidence, that the matters in controversy had been determined by a former suit on the original promise, and that the same defence of fraud and want of consideration was set up in both actions. *ib*

27. The defence of former recovery, or of former adjudication, may be urged under the general issue. *ib*

28. Standard medical books are admissible as evidence of the author's opinions upon questions of medical skill and practice, involved in the trial of a cause. *Bowman v. Woods*, 441

29. In an action for malpractice as a physician, evidence is admissible to prove that defendant's treatment of the case was according to the botanic system of practice and medicine, which he professed and was known to follow. *ib*

30. In an action of trespass, for seizing and detaining goods, the belief or opinion of a merchant, that the plaintiff had sustained injury in credit as a merchant, to a specified amount, is not admissible. The testimony of the witness should be limited to the facts, and the jury will estimate damages from those facts. *Thomas v. Isett*, 470

31. Loss of credit in such an action cannot be proved, until it appears to be intimately connected with the act complained of, and to have been done with an aggravating and malicious intention to injure the party complaining. *ib*

See AGENT, 2.

AGREEMENT.

FERRY, 1.

INSTRUCTIONS TO JURY.

PRACTICE, 9, 16.

F

FRAUD.

See EVIDENCE, 25, 26.

FERRIES.

1. Where the requirements and conditions of a lease to keep a ferry have been violated by the lessee, a court of equity may declare the same to be forfeited. *Phillips v. Town of Bloomington*, 498
2. Where the conditions of a lease require the lessee to establish and keep a good and sufficient steam ferry-boat, for the safe conveyance of passengers and their property, at all usual and reasonable times, without delay, unavoidable accidents excepted; it was held, that testimony of frequent application of persons for passage across the river, and the refusal of the lessee for hours to notice them, and of the departure of such persons to other ferries, &c., is admissible to prove a forfeiture of the conditions of the lease. It was also held, that the lessee having green wood, and being moored on the opposite side of the river, afforded no excuse for such delay; that it was his duty, under the lease, to provide himself with the boat and the means of propelling, in order to ferry promptly from and to the Iowa shore; and it was also held to be admissible to prove the boat to be unseaworthy, and unfit for the business, by an authorized surveyor of hulls, or by any competent witness, in order to show a failure to comply with the conditions of the lease. *ib*
3. The general assembly has the power to confer the exclusive privilege upon individuals or towns, to maintain and keep ferries on the Mississippi river. *ib*

G

GUARANTY.

See PROMISSORY NOTES, 6, 7.

H

HUSBAND AND WIFE.

1. Where the defendant had been living apart from her husband, but both within the state, for about two

years, when she gave a note as *feme sole* to the plaintiff, who knew the fact of her marriage, it was error in the court to instruct the jury that the proof of coverture was no defence to the action on the note. *Painter v. Weatherford*, 97

I

INDICTMENT.

1. In an indictment for perjury, committed before a justice of the peace, it is sufficient to aver, in relation to jurisdiction, that it was at a justice's court, held at the proper time and place, on an issue duly joined in his court, in a cause which came on to be tried in due form of law, and that the justice had sufficient authority to administer an oath; without alleging that the case, in which the perjury is charged to have been committed, was within the jurisdiction of the justice. *State v. Newton*, 160
2. Under the statute, the names of the witnesses, upon whose evidence an indictment is found, should be noted upon it. But where the witness was not objected to at the trial on that account, the irregularity will be regarded as waived, and will afford no ground for a new trial. *Ray v. State*, 316
3. An indictment is good, though the year is expressed in it by numeral figures. Statutes of Great Britain not in force in Iowa. *State v. Seemons*, 418
4. If the nature of an assault, charged in an indictment, is set forth substantially in the language of the statute, it is sufficient. *ib*
5. Where the indictment alleged the assault to have been committed with a "deadly weapon," in the language of the statute, it was held to be a sufficient description of the instrument used. *ib*
6. It is sufficient, if an indictment states in substance all the facts which constitute the offence under the statute, sufficiently clear and specific, so that the accused cannot be mistaken in its nature, and would be enabled to

plead an acquittal or conviction upon it in bar of another prosecution for the same offence. *ib*

7. In an indictment for obstructing a road, leading from a point in Jefferson county, to Lake Prairie in Mahaska county, the defendant offered to prove Lake Prairie to be in Marion county and not in Mahaska. Held not to be admissible; the discrepancy not being material, and could not impair the description or identity of the road. *Harrow v. State*, 439

8. An indictment and conviction are proper for obstructing a road established by re-location: even if it had not been opened and used as a highway. *ib*

9. An indictment for perjury under the statute is bad, which does not charge, in the language of the act, that the defendant "wilfully and corruptly deposed, affirmed, or declared matter to be fact, knowing the same to be false, or denied matter to be fact, knowing the same to be true." *State v. Morse*, 503

10. If an indictment does not substantially follow the language of the statute, it does not clearly charge an indictable offence, and is consequently not cured by that section of the statute which provides that "no indictment shall be quashed if an indictable offence is clearly charged therein." *ib*

11. When an indictment charges an assault to have been committed with several different weapons, it is not necessary to prove that the defendant used all the weapons described. The indictment will be sustained by proving that one of the instruments was used as alleged. *State v. McClintock*, 392

INJUNCTION.

1. Where there is a judgment, and also a decree against a party for the same demand, the collection of the money under the decree cannot be enjoined, unless the complainant allege in his bill that the judgment has been satisfied. *Dunham v. Collier*, 54

INSTRUCTIONS TO JURY.

1. An instruction upon principles of law, pertinent to the issue, and responsive to the averments in the declaration, should not be refused; and the evidence, to which such instruction of law is applicable, need not be set out in the bill of exceptions. *Powers v. Bridges*, 235

2. It is not the province of the court to decide upon the sufficiency of testimony pertaining to the facts in a case; nor to order the jury upon the facts to find for either party. The instruction should be exclusively limited to the law of the case. *Woods v. Mains*, 275

3. In an action of trespass for killing a mare, the court should, on request, instruct the jury, "that the plaintiff could not recover, unless proved to their satisfaction that the defendant did kill the plaintiff's mare unlawfully." *Harding v. Fakey*, 377

4. It is not the province of the court, under our statute, to instruct the jury upon questions of fact. The charge of a judge should be confined exclusively to the law of each case. *Frederic v. Gaston*, 401

5. After a jury retire to consider their verdict, and come into court for further instruction at an unusual hour, it is irregular to give such instruction in the absence of a party or his counsel. *Davis v. Fish*, 406

INTEREST.

1. By provision of statute, an account bears interest from the time of its liquidation; and that will be presumed from the day the account was presented for payment, if no objection is made to its correctness. *David v. Conard*, 336

2. In order to recover interest on an account, it should be averred in the declaration, and specified in the bill of particulars. *ib*

3. Under the statute authorizing parties to contract for interest not exceeding twenty per centum per annum, it was legal to make a note

drawing twelve per cent, and if not paid when due, fifteen per centum per annum. It will not be considered by a court of equity as a contract for a penalty, but for interest after a given day. *Wilkerson v. Daniels*, 180

See COUNTY ORDERS.
JUDGMENT, 1.
USURY.

JUDGES.

1. The division of the state into four judicial districts, by the statute which took effect on the 10th day of February, 1847, produced a vacancy in the office of district judge in each judicial district; which vacancy continued till the election of district judges by the people, on the first Monday in April following. *Allen v. Dunham*, 89
2. During such vacancy, no writ could issue from the district court with the requisite attestation of the judge. *ib*
3. The territorial judges, holding over under the constitution of the state, could not act as judges of the supreme court, and also of the district courts; as the two offices in the same person are constitutionally incompatible. *ib*

JUDGMENT.

1. Upon a note drawing ten per centum interest, it is erroneous to make the judgment draw the same rate of interest. It should draw only six per centum, as regulated by statute. *Burkhart v. Sappington*, 66
2. A judgment cannot operate as a lien upon a pre-emption right to land; it attaches only to the estate in fee, or by inheritance. *Harrington v. Sharp*, 181
3. A judgment will not operate as a lien upon after-acquired estate, under the laws of Iowa, until a levy is made. *ib*
4. Where a verdict had been found for the defendant, upon an insufficient plea in avoidance, a judgment *non obstante veredicto*, may properly be rendered for the plaintiff. *Jones v. Fennimore*, 134
5. A judgment by *nil dicit* cannot be rendered when there is a plea of general issue on file in the case, unless the plea is expressly or tacitly withdrawn; and such withdrawal will be presumed, if it appears by the record that defendant's counsel was in court at the time judgment was rendered against his client, and made no objection. *Miller v. Hardacre*, 184
6. A judgment will not be reversed for trivial causes, not affecting the rights of parties, or the established rules of practice. *Mackemer v. Benner*, 187
7. Under the laws of Wisconsin and Iowa, previous to the statute of frauds of 1840, judgments did not operate as liens upon real estate. *Woods v. Maine*, 275
8. The 6th section of "An act to prevent frauds," extended to all valid judgments previously rendered in the supreme and district courts, and gave to every such judgment, *in esse*, at the date of its approval, as effectual a lien upon the real estate of the judgment-debtor, as subsequent judgments could. This section also extends to operative judgments rendered within the limits of Iowa, under the territorial governments of Michigan and Wisconsin. *ib*
9. A judgment not a lien upon after-acquired estate. *ib*
10. The district courts have discretionary power to set aside judgments, upon sufficient cause shown by affidavit. *Martin v. Van Bergen*, 314
11. A judgment, rendered after the last hour of the last day of a term, as fixed by law, is *coram non judice*, and void. *Davis v. Fish*, 406
12. A judgment, rendered for a party in another state, is conclusive, as to the existence of such party, at the rendition of the judgment. *Cook v. Steuben Co. Bank*, 447
13. A judgment against a surety for costs, should not exceed the penalty

of the bond or recognisance. *Perry v. Denson*, 467

14. A judgment, rendered against a party not served with process nor declared against, will be reversed. *Temple v. Carstena*, 492

See ERROR, 5, 7.

INJUNCTION.

VERDICT, 1.

JURISDICTION.

1. The defendant, having been served with process, had his day in court, and should have appeared and objected to the jurisdiction of the court; having neglected to do so, it will be presumed that the court properly exercised jurisdiction. *Caudill v. Tharp*, 95
2. Under the state constitution, the supreme court cannot entertain jurisdiction of a chancery case on a writ of error. *McPoland v. Fitzpatrick*, 543

See EVIDENCE, 3, 6.

JURORS.

1. Jurors, who rendered a verdict against the defendants on an indictment, are not competent jurors in an action of trespass against the same defendants, involving the same questions, and in relation to the same subject matter; nor are they rendered competent by declaring upon their *voir dire* that they had not formed or expressed an opinion. *Spicer v. Spencer*, 534

See INSTRUCTIONS TO JURY.

VERDICT.

JUSTICE OF THE PEACE.

See EVIDENCE, 3, 4, 6, 14.

L

LARCENY.

1. The fact, that a portion of the chattels were found upon the premises

of the accused, eighteen months after they were stolen, unaccompanied by other suspicious circumstances, is not *prima facie* evidence, that the accused was guilty of the larceny. *Warren v. State*, 106

2. It is no objection to the verdict on an indictment for larceny, if the jury find the aggregate value of the articles stolen. 16
3. A coon comes under the denomination of animals, *fera natura*, and is not the subject of larceny. 16
4. A judgment against the prisoner on an indictment for larceny, will not be disturbed, merely because among the things stolen there was an item, on taking which, a person would not be liable for stealing, when it appears by the record, that the exclusion of that item could not reduce the nature of the offence, nor materially lessen the amount of the fine. 16
5. A verdict for larceny should fix the value of the property stolen. *Ray v. State*, 316

LIEN.

1. A lien, by attachment, or by a judgment, will hold against a prior unrecorded deed. *Brown v. Tuthill*, 189

See JUDGMENT, 2, 3, 7, 8, 9.

LIMITATION, STATUTE OF.

1. A statute of limitations constitutes a presumption of payment from lapse of time; it is merely a statute of repose, forming no part or consideration of a contract; and as a party can and should preserve evidences of payment, its repeal can work no grievance. *Norris v. Slaughter*, 338
2. The statute of limitations of 1843, containing no saving clause, but unconditionally repealing the prior limitation law, cannot be pleaded in bar to an action of assumpsit, until six years after it took effect. It does not operate retrospectively upon contracts. 16
3. Under the statute of limitations, the

defendant being without the state when the cause of action accrued, suit may be brought against him at any time within six years after he shall next come within the jurisdiction of the state. *Pratt v. Hubbard*, 9

M

MEDICAL BOOKS.

See EVIDENCE, 28.

MILL-DAMS.

1. The penal statute, relative to injuries to mill-dams, being merely cumulative, it can have no abrogating influence upon the common law. *State v. Moffett*, 247
2. A person, under legislative sanction, has a right to erect a dam upon a stream, in which he is interested as a tenant in common; but cannot be justified in so erecting as to encroach upon the rights of others. *Moffett v. Brewer*, 348

MISNOMER.

1. The omission to set out the proper name of a party, can only be taken advantage of by a plea in abatement, unless the defect appears of record. *Davis v. David*, 427
2. The maker of a note acknowledges the name of the payee as set forth in the note, and in an action on the note, is estopped from setting up that such is not his proper name. *ib*

MORTGAGE.

1. An action to foreclose a mortgage under the statute, is regarded as a proceeding in chancery, and consequently, can only be brought to the supreme court by appeal. *Tomlinson v. Funston*, 545
2. B. and W. not being parties to the mortgage, the bill to foreclose it was

properly dismissed as to them. *Wilkerson v. Daniels*, 180

3. In a decree of foreclosure, the district court has no authority to order the sale of any other land than that described in the mortgage. *ib*
4. A note made in connection with a mortgage, need not, in a proceeding to foreclose, be made a part of the bill, if such note is produced in court subject to an order of cancellation. *Knetser v. Bradstreet*, 382
5. A mortgage can be foreclosed, though a suit at law is pending on the note; but a payment of one will be in satisfaction of both. *ib*

See PLEADINGS, 7.

N

NEW TRIALS.

1. A motion for a new trial, based upon facts, is addressed to the sound discretion of the court; but should always be allowed, if the verdict is contrary to law, or works manifest injustice to the party applying. *Cook v. United States*, 56
2. In applications for new trials, this court can only review and correct the discretion of the district court, when exercised upon questions of law, affirmatively shown by the record. It will be presumed that the court below acted properly, if the record does not disclose the points upon which the motion for a new trial was made. *ib*
3. An application for a new trial on the ground of newly-discovered evidence, is usually confined to the sound discretion of the district judge, and the decision below cannot be reviewed and corrected by this court, unless made upon principles of law, or upon facts brought up in the record of the case. *Warren v. The State*, 106
4. It is a safer rule to require the affidavit of the newly-discovered witness to accompany the motion for a new trial. *ib*
5. Where the reasons and evidence for

- a new trial appear of record, and come within recognized rules of law, the question may very properly become the subject of review and correction in the supreme court. *Jones v. Kennimore*, 134
6. If, by any reasonable cause, a party has been unable to present the merits of his case to the jury, a new trial should be granted to him. *ib*
7. The granting of a new trial is a question of sound discretion, which will not be disturbed, unless a flagrant case of injustice is made to appear. *Powers v. Bridges*, 235
8. After a final judgment has been entered, and an application for a new trial overruled, it is irregular to entertain a second motion for that object. But after the court has granted such new trial, the plaintiff, by appearing and amending his declaration, waives the irregularity. *ib*
9. Where the accused is found guilty on the uncorroborated testimony of an accomplice, it affords good cause for a new trial. *Ray v. State*, 316

See ERROR, 7.

NONSUIT.

See PRACTICE, 13, 14, 15, 16, 17.

NOTICE

See TIME
PRACTICE, 25, 26.

NUISANCE

1. The statute, making it a penal offence to injure a mill-dam, does not take away the common law right to abate a nuisance. *State v. Moffett*, 247
2. An act of the legislature, authorizing R. to build a dam, does not take away the right of M. to abate it as a nuisance, if it cause the water to flow back upon M., to his serious disadvantage. *ib*
3. In abating a nuisance, no more injury must be done to the property than is absolutely necessary to effect the object. *ib*
4. To come within the prohibition of the statute, the injury to a dam must have been wilful and malicious. The necessary abatement of a nuisance by one's own act would not disclose such motives. *ib*
5. In exercising the common law right of abating a nuisance, the party should go no farther than is absolutely necessary; and should commit the least practicable injury in accomplishing the object. *Moffett v. Brewer*, 348
6. To justify a person in thus taking the law into his own hands, it should appear that the nuisance was a particular injury to his person or property, and operating prejudicially at the time of its abatement. It should be authorized only in cases of particular emergency, requiring a more speedy remedy than can be had by ordinary proceedings at law; and, in case of private nuisance, the remedy should be resorted to within a reasonable time. *ib*
7. If a mill-dam is erected so high, as to flow the water back upon a dam above it, under circumstances which might justify the injured party in abating it, by his own acts, he must confine his operations to the dam itself, and to such portions of it only as caused, and by dejection would remove, the injury. *ib*

See WATERCOURSES, 3.

P

PARTNERSHIP.

1. When a partnership is duly proved, the admission of one partner will bind the firm; but the admission of one partner is not sufficient to prove the existence of the copartnership as against the other partner. *Evans v. Corriall*, 25
2. It may be doubted, whether either member of a copartnership can dissolve it, where its duration is fixed

by articles of covenant for a term of years. *Blake v. Dorgan*, 537

See EQUITY, 7, 8.

PHYSICIANS.

1. There is no particular system of medicine established or favored by the laws of Iowa; no system is prohibited. *Bowman v. Woods*, 441
2. The law implies an undertaking, on the part of every medical practitioner, that he will use an ordinary degree of care and skill in his practice, and will hold him liable for gross carelessness, or unskillfulness. *ib*
3. A physician is expected to practise according to his professed and avowed system. *ib*

PLEADINGS.

I. In Equity.

1. In a petition for a mechanics' lien, it is sufficient to describe the lot as being "number seven hundred and fifty-one in the city of Dubuque;" and the following description of the house was held to be sufficiently certain: "a brick house, upon said lot, to be twenty feet by thirty, two stories high, and a cellar." *O'Halloran v. Sullivan*, 75
2. If there was a want of common certainty in such a description of the lot, it was incumbent upon the defendant to show wherein the defect or uncertainty consisted. *ib*
3. The defendant waives any irregularity in the filing of a *precipe*, by appearing and pleading in the case. *ib*
4. In equity, when the bill sets out and seeks to enforce a usurious contract, it is not necessary for the defendant to plead the usury, in order to prevent a decree for the usurious portions of the contract. *Phelps v. Pierson*, 121
5. A creditor, before seeking to obtain

a decree upon a bill disclosing usury, should allege therein a willingness to abandon the usurious portion of the contract; otherwise a demurrer to the bill should be sustained. *ib*

6. A bill is bad on demurrer, which merely charges that the defendant was about to commit a flagrant injury, in setting up a claim, unauthorized by law, to establish a highway through his cultivated lands, without alleging that he had perpetrated any injury, or showing in what connection or way the injury was about to be committed, under legal sanction; or that defendant was insolvent, and unable to answer in an action at law for damages. But the supreme court has a discretion over the question of jurisdiction in such a case, where the party has waived the objection by pleading. *Dinswiddle v. Roberts*, 363
7. Where B. and M. filed a bill to foreclose a mortgage against J. M., and W. M. was made a party defendant by an amended bill, to which J. M. made no answer, but W. M. answered, and set up fraud in B. and M., in obtaining an assignment of the mortgage from him as the original mortgagee; it was held, that on dismissing the bill as to B. and M., a decree of foreclosure could not be rendered in favor of W. M. against J. M., as he was not summoned to answer a bill describing such an interest, nor to respond to parties in the character of trustees; and that to justify such a decree, J. M. should have been made an adversary party to W. M., by motion or cross-bill. *Miller v. McGalligan*, 527

II. At Law.

1. Cognovit.

8. In a proceeding on cognovit, or on a power of attorney, to confess judgment, in which the nature and amount of the plaintiff's claim are acknowledged, a declaration is not necessary. *Ober v. Shepherd*, 430

2. Declaration.

9. The omission, to aver damages at the conclusion of a declaration, and of each count, is cured by verdict, when the declaration contains an al-

- legation of indebtedness for a greater amount than that of the judgment. *Humphreys v. Daggs*, 435
10. A count, for the asportation of goods, may be joined with a count for trespass, *quare clausum fregit*. *Wilson v. Johnson*, 147
11. If a plaintiff goes to trial on two counts of a declaration containing four, he abandons the other two counts; and should not afterwards object to the action of the court in sustaining a demurrer to them. *Eddy v. Wilson*, 259
12. A complaint against a boat, under the statute, should aver, in substance, that it was navigating the waters of the state at the time of the liability; but it is sufficient, after pleading over, if the complaint allege that the contract was made at a town within the state, by the master or clerk of the boat. *Steamboat Kentucky v. Brooks*, 398
3. Pleas.
13. A plea, averring complete performance of all the conditions of the bond sued upon, is not demurrable. *Musgrave v. Muscatine Co.*, 446
14. A special plea to an action on a delivery bond is good, which alleges that a judgment *in rem* had been rendered against particular property, and that instead of taking the property so held for the debt, the sheriff levied upon other property not affected by the judgment. As the levy was unauthorized and void, the sheriff had no authority to exact a delivery bond, and the obligors were under no legal restraint to replace the property in his possession. *Humphreys v. Humphreys*, 477
15. A plea, in such an action, that the sheriff was not in attendance at the time and place designated for the delivery of the property, is not sufficient. *ib*
16. In such an action a plea is good, which alleges that the judgment was rendered under the valuation law, and that the sheriff did not, as required by that law, take to his assistance two disinterested persons, to estimate the value of the property levied upon. *ib*
17. Where the plea of usury is withdrawn, and the same question is raised on demurrer to the declaration, by consent of parties; the plaintiff in error cannot afterwards object to that method of disposing of the question. *Haggard v. Atlee*, 44
18. By pleading, the defendant waives all objection to the overruling of his demurrer, especially where the defects are not substantial. *Steamboat Kentucky v. Brooks*, 398
19. A note was given for a lot in the town of Newport, while it was the seat of justice for Jones county. Shortly after, a law was passed, authorizing the legal voters of the county to establish the county seat, and it was accordingly removed to the town of Lexington, whereby the lot in question was rendered comparatively valueless. To show that the consideration of the note had entirely failed, these facts were specially pleaded. Held that the plea was demurrable; that the facts show nothing inconsistent with good faith and fair dealing on the part of the defendant, as he could not be held responsible for the subsequent act of the general assembly and the vote of the people; and that the right of removing seats of justice is an attribute of the law-making power; and whoever buys lots in such a place, does so subject to the exercise of that power, and to the contingency of a change in the location. *Sawm v. Jones Co.*, 165
20. By pleading to the merits, a party waives a defect, such as a variation between the transcript described in the declaration, and the one offered in evidence. *Young v. Thayer*, 196
21. The coverture of the defendant may be given in evidence under the general issue. *Painter v. Weatherford*, 97
22. A joinder in short to an assignment of errors amounts to a plea of *nullo est erratum*, and is, in effect, an averment that the record generally is without error, and subjects the whole to the scrutiny of the court. *David v. Ransom*, 383

POSSESSION.

See TRESPASS.

PRACTICE.

I. IN EQUITY.

1. Under the constitution, a proceeding in chancery can be brought to the supreme court only by appeal, under which the facts and the law of the case will be fully reviewed and re-adjudicated. *Stockwell v. David*, 115
2. Before a debtor can secure aid in chancery to avoid usury in a contract, he should tender to his creditor the principal and legal interest. *Phelps v. Pierson*, 121
3. Where a proceeding in chancery appears to have been brought to the supreme court by writ of error, under territorial laws, the case will be decided upon such errors only as are assigned, and appear of record. *Chapman v. Arnold*, 368
4. The evidence in such a case is no part of the record, unless embraced in a bill of exceptions. *ib*
5. Unless the contrary affirmatively appears, it will be presumed that a decree in the court below was justified by the evidence. *ib*
6. Where the answer to a bill is not sent up with a transcript of the record, the respondent will not be permitted to file another answer; but where it properly appears that such answer is lost or destroyed, and that the defence therein set forth is substantial, the cause will be continued, in order to give the court below time to supply the lost record. *Tomlinson v. Runton*, 544

II. AT LAW.

1. *As to Declaration.*

7. The statute requiring a declaration to be filed in each case ten days before the second term of the court, applies alike to special and to general terms. *Harman v. Goodrich*, 13

8. The filing of a declaration, as required by statute, is a rule of practice which the attorneys of the court are required to observe. *ib*

2. *As to Damages.*

9. Though the plaintiff is nonsuited in an action of replevin, he may still offer testimony to prove ownership of property in himself, upon inquiry into the right of the defendant's possession; in order to show that the defendant could have sustained no substantial damage, as he was not the owner of the property. *Harman v. Goodrich*, 13
10. The New York and English practice of moving to set aside the inquest for irregularity, is not applicable to the statute of Iowa, under which the inquiry of damages is made in open court, and not by the sheriff. *ib*
11. A finding by the jury as to one defendant on a note, is a sufficient assessment of damages against his co-defendant. *Bernard v. Barry*, 388
12. Upon finding a verdict, the jury should assess damages, and not the court. *Wiley v. Arnold*, 365

3. *Nonsuit.*

13. Where a verdict cannot be legally warranted by the evidence, without setting it aside; or where the pleadings are so defective as to justify an arrest of judgment, the court may order the plaintiff to be nonsuited; but not where there is even doubt as to the sufficiency of evidence. *Mason v. Lewis*, 494
14. When a nonsuit is either voluntary or ordered by the court, the plaintiff may recommence his action. *ib*
15. A judgment of nonsuit, because the declaration was not filed in time, may be set aside, when it appears by affidavit that the delay in filing the declaration was occasioned by an arrangement between the parties to settle. *Martin v. Van Bergen*, 314
16. In an action, *ex delicto*, where there is no evidence against a defendant, or such deficient evidence that the court would be justified in setting

aside the verdict, the court may order a nonsuit without the consent of plaintiff. *Eddy v. Wilson*, 259

17. By provision of the statute, after the jury have retired to agree upon their verdict, it is too late for the plaintiff to claim a nonsuit. *Jones v. Fennimore*, 184

4. Opening Statement.

18. Though an attorney, in his opening statement to the jury, claimed for his client a special property only in a chattel, evidence of general property is admissible. *Frederick v. Gaston*, 401

5. Things Presumed.

19. Where it appears by the record that the cause was submitted to the court, by consent of parties, it will be presumed that the right of trial by jury was waived. *Saun v. Jones Co.*, 166
20. Where the record of a case is silent relative to the circumstances under which a nonsuit was rendered, as to one of the defendants in an action on the case, it will be presumed that the court acted properly. *Eddy v. Wilson*, 259
21. When the district court rejects a plea in abatement, and the defendants take no exception to the ruling of the court, but file a different plea, and upon it apparently rest their defence; it will be presumed that the plea in abatement was waived, or the objection to the ruling of the court abandoned. *Cook v. Steuben Co. Bank*, 447
22. If the bill of exceptions does not fully set forth the evidence upon the point about which the court is requested to charge the jury, but still the facts involved tended to raise that point; and when the party for whom the verdict was given asked for the instruction, it will be presumed that the instruction was applicable, and had some influence with the jury. *Carson v. Lucore*, 33
23. Under the statute of 1842, regulating practice in the district courts, &c., a plaintiff was authorized to commence suit in the county in which he resided, if the cause of action accrued, or was to be performed there, and have process issued to the county in which the defendant resided. *Caudill v. Tharp*, 94
24. It appearing by the declaration and copy of the note sued on, that at the date of the contract, the plaintiff was a resident of the county in which suit was commenced, it will be presumed, *prima facie*, that he resided there at the institution and determination of the cause. *ib*
6. *As to Notice, &c.*
25. Any appearance or acquiescence in the proceedings of a suit in the supreme court, will be regarded as a waiver of the notice of suing out a writ of error. *Morrow v. Carpenter*, 469
26. The want of such notice should be taken advantage of within a reasonable time, and before any other proceeding or appearance in the case. *ib*
27. The supreme court will not be confined exclusively to an examination of the errors assigned. *David v. Ransom*, 383

PROMISSORY NOTES.

1. Where a lost promissory note, which was made payable to bearer, is the ground of an action in chancery; to enable the complainant to recover, he must indemnify the defendant by bond and security against all claims on the note. Such indemnity may be required by decree of the court, and the complainant authorized to recover on compliance therewith, and on payment of costs. *Burrows v. Goodhue*, 48
2. A note, payable in specific property, is admissible in evidence under the common or money counts. *Payne v. Couch*, 64
3. A person cannot be rendered liable on a bill of exchange or promissory note, unless his name, or the style of the firm of which he is a member, is attached to some portion of it as a party. *Thurston v. Mauro*, 231
4. Where a person, not a party, writes

- his name on the back of a negotiable promissory note, the law presumes that he is a strictly commercial indorser, even when his indorsement cannot be made operative without the aid of another. *Fear v. Dunlap*, 381
5. Such an indorsement on an instrument not negotiable creates no liability, without oral or written proof of an undertaking to be responsible for a valid consideration. *ib*
 6. Such an indorser on any note incurs whatever liability he assumes, on sufficient consideration, and the holder may fill up the blank indorsement with the undertaking, and recover accordingly; and if he assumes the responsibility of guarantor, he is relieved from liability only to the extent of the injury he may prove for want of demand and notice. But under our statutes it is not necessary for a plaintiff to prove demand and notice, in order to recover in a suit against an indorser. *ib*
 7. Where a person not a party to the note refused to assume the liability of a maker or surety, but merely to indorse, he will be considered a second indorser; and a recovery cannot be had against him in the name of the payee, on special counts as the maker, or as guarantor of the note, nor on the common counts. But if the payee had indorsed and put the note in circulation, a subsequent indorsee might recover against such party as second indorser, had the maker failed in payment. *ib*
 8. Where a credit, indorsed upon the back of a note, was partly erased, and a certificate attached signed by two persons, that the indorsement was made by mistake, it was held that such certificate is not *per se* evidence of the fact therein stated. *Carson v. Duncan*, 466
 9. Such credit can only be erased by authority of the party in whose favor it was given. *ib*
 10. Where no time of payment is mentioned in a note, it is in contemplation of law payable on demand. *Green v. Drebbila*, 552
 11. Such a note should be described in the declaration as a note payable on demand; but the words "on demand" need not be used, if words of equal import aver the time of payment. *ib*
 12. Where G. assigned a note to C., Oct. 24, 1841, and on the 18th of December following, C. assigned the same to W., without recourse: some time after W. assigned in the same way to B., from whom the note came to the possession of D.; it was held that as B. had no recourse on W., and W. none upon C., that C. was not responsible to any subsequent indorsee; it was also held that G. having been discharged from all liability as an indorser to all the indorsees, except D., by lapse of time and negligence to collect, and D. having executed a release to G., rendered him a competent witness. *Wilkerson v. Daniels*, 179
 13. Where B. signed the note as security, and subsequently took it up, it was not rendered *functus officio*; he might re-issue the note as often as he took it up. *ib*
 14. A bill of exchange drawn in one state upon a person residing in another state, is treated as a foreign bill. *Bernard v. Barry*, 388
 15. Where a negotiable promissory note was made in Missouri, and indorsed in Maryland, the *lex loci contractus* will govern the liability of indorsers; and it will be presumed that the *lex mercatoria* prevails in those states, rendering indorsers liable on demand and notice, without suit against the makers. Such a note partakes of the nature of a bill of exchange; and there is no reason why the same rule should not apply as to the reception of a notarial protest as evidence; still, an arbitrary difference is made, but it is admissible as a part of a notary's testimony in proving demand and notice. *ib*
 16. Where several sue as indorsees on a bill or note indorsed in blank, they need not prove a partnership, nor an express transfer to themselves. *ib*
- See EVIDENCE, 21, 23, 26, 27.

R

RECORD.

1. An execution and returns copied into a transcript are no part of the record, unless made so in some manner known to the law. *Mattoon v. Burge*, 158
2. In order to bring papers, used on the trial below, before the supreme court, as a part of the record, they should be incorporated into the bill of exceptions, or plainly identified thereby. *Reed v. Hubbard*, 158
3. The fee book, under the statute, may become a part of the record in a case; but unless the fee bill was made up under the direction of the court, it is merely a record of the clerk's proceedings. *Yeager v. Circle*, 438
4. A motion in a case is no part of the record, unless made so by bill of exceptions. *Cook v. Steuben Co. Bank*, 447

See EVIDENCE, 2, 3, 7.

REMITTITUR.

1. Where the damages awarded in the district court are more than the amount laid in the declaration, a *re-mittitur* may be entered for the excess, and judgment affirmed in the supreme court for the amount alleged. *David v. Conard*, 836

REPLEVIN.

See PRACTICE, 9.

ROAD VIEWERS.

1. The acts of road viewers are not void, if they omit to state in their report that they had been duly sworn; such a statement is not required. *Dollarhide v. Muscatine Co.*, 158

ROADS.

1. On opening a road through cultivated lands to the injury of the owner,

he is entitled to adequate compensation. *Dinnwiddie v. Roberts*, 363

2. A road is established when the survey and plat are placed upon record as required by statute. *Harrow v. State*, 439

See BOUNDARIES, 3.
INDICTMENT, 7, 8.
PLEADINGS, 6.

S

SET-OFF.

1. A payment made by the maker of a note to the payee, after it was transferred, and of which the maker had knowledge, cannot be allowed as a set-off in an action on the note for the use of the holder. *Gregg v. McCulloch*, 274

SHERIFFS DEED.

1. A sheriff's deed is admissible in evidence, although it contains a variance or mistake, in reciting the execution, and also in referring to the decree upon which the land was sold. *Humphreys v. Beeson*, 199
2. The omission of the officer to state in his return that notice had been served upon the execution defendant, as required by statute, cannot prejudice the rights of a *bona fide* purchaser, nor invalidate his deed as evidence. *ib*
3. The valuation law does not require the officer to sell precisely the quantity of land, necessary, at two-thirds its appraised value, to satisfy the execution. If more than enough is sold, it will not vitiate the sheriff's deed. *ib*

SHERIFFS FEES.

See COSTS, 4.

STATUTE.

I. Publication.

1. The publication of a statute in news-

papers, without the direction or authority of the general assembly, is not sufficient to give it effect, as required by the state constitution. *Calkin v. The State*, 68

2. The note of the secretary of state, appended to an act of the general assembly as published in pamphlet form, stating that the act was published in certain papers at a given date, is not evidence of the fact. *ib*

2. Construction.

3. The mischief existing at the time of the enactment, and the remedy intended, are to be taken into consideration in construing a statute. *Woods v. Maine*, 275

4. The intention of the legislature is a prevailing object in the proper construction of a statute; and that intention can be best determined by the application and meaning of the language used. But if the language in portions of an act is not consistent, it should be so construed as to accord with the leading object of the enactment. *Noble v. State*, 325

5. Where the manifest intention of the legislature may be gathered from prior existing laws, and from the prevailing tone of other sections of the act, conflicting words may be diverted from their literal meaning, in order to harmonize with more explicit portions. They may be restrained, enlarged, or qualified, so as to give effect to the obvious intention of the law. *ib*

6. Grants and franchises are to be construed in favor of the state. *Miners' Bank v. United States*, 553

7. A remedial statute should be so construed as to meet most effectually the beneficial end in view, and prevent a failure of the remedy intended. *Steamboat Kentucky v. Brooks*, 398

SUNDAY.

1. A verdict received, or a judgment rendered on Sunday, is void. *Davis v. Fish*, 406

T

TAX SALES

1. Under the revenue statutes of 1844, lands are subject to sales for taxes, in two years after the taxes shall have become due, and remain unpaid, dating from the first day of January, on which the taxes became delinquent. *Noble v. State*, 325

TIME.

1. In computing the time of serving process before the return day, the day of service should be included, and the day of return excluded. *Dilts v. Zeigler*, 164

2. When, by agreement, twenty days are granted a party to prepare a bill of exceptions, and within that time he presents the bill to the judge for his signature, though it was not filed with the clerk till five days after; it was held to be sufficient; and that filing the bill with the clerk was not a necessary part of the preparation. *Humphrey v. Burge*, 223

3. In computing the time of service, before the return day of a writ, the day of service should be included, and the return day excluded. *Temple v. Carstens*, 493

TRANSCRIPT.

1. Upon an affidavit, made in the district court, that the transcript from a justice of the peace is erroneous, in setting forth the day upon which affidavit for an appeal was made, it is proper to rule the justice to file an amended transcript; and such amended transcript must be regarded as so much of the record in the case. *Cook v. United States*, 39

TRESPASS.

1. The plaintiff, having the right of property, and of immediate possession, he may maintain the action of trespass for a direct injury upon the

estate, though not in actual possession. *Mason v. Lewis*, 494

U

USURY.

1. A usurious contract, under the statute of Iowa, is not void. *Haggard v. Atlee*, 44. *Shuck v. Wight*, 128
2. A note, payable two years after date, to bear interest at fifty per centum after due, until paid, is not usurious. *ib*

See PLEADING, 4, 5, 17.
PRACTICE, 2.

V

VENDOR AND PURCHASER.

See AGREEMENT.

VENUE.

See PRACTICE, 23, 24.

VERDICT.

1. After a judgment is entered upon the verdict of a jury, it is not proper to entertain a motion to set aside the verdict without first having the judgment opened. *Cook v. United States*, 56
2. In an action of ejectment, the verdict of the jury should expressly name the party in whom they find the right of possession; where the jury in such an action omit in their verdict an important item of property, upon which issue was joined, and submitted to their finding, it is a substantial defect, and one that cannot be corrected by the action of the court; and it was erroneous to render judgment upon such a verdict. *Wise v. Hine*, 62
3. The supreme court has no greater power than the district court, to alter a defective verdict. *ib*

4. Affidavits of jurors may be received to show that they entirely misunderstood the instructions of the court; and that fact being clearly established, the verdict should be set aside, and a new trial granted. *Packard v. United States*, 225

5. Where the jury, before a justice, in a trial for an assault, returned a verdict of "guilty of a breach of the peace" against the accused, and assessed the fine at five dollars, it was held to be substantially correct. *State v. Douglass*, 550

See PRACTICE, 12, 13, 16, 17.

W

WAGER.

1. A wager, or bet, made between parties on the result of an election, is void; and a third party furnishing the means upon which such wager is made, upon condition that the losing party shall pay, cannot recover, unless the defendant made a new contract or promise to pay, after the bet was determined. *David v. Ransom*, 383
2. In proving such new contract, it is sufficient for the plaintiff to show that, since the result of the wager had been ascertained, the defendant requested the plaintiff to deliver the property to another, and he had so delivered it, without express proof that defendant requested him to charge it, and promised payment. *ib*

WATERCOURSES.

1. The right to have a stream flow in its accustomed course is universally incident to the property in the adjoining lands; and the riparian proprietor on one side of a stream, cannot be justified in diverting its course from others, even by excavation through his own land. *Moffett v. Brewer*, 348
2. Skunk river not being a navigable stream, the bed and waters between the banks, owned by different individuals, are common to both. *ib*

3. Tenants in common have a right to erect dams across such a stream, but not in a manner, or so high, as to injure other tenants in common; but if so erected, it becomes a private and not a public nuisance, and therefore should be abated within a reasonable time. *ib*

See NUISANCE, 2, 7.

WITNESS.

1. The general character and standing of a witness, as a good or bad man, without reference to his character for truth, is not admissible for the purpose of impeaching him. *Carter v. Cavanaugh*, 171
2. In an effort to impeach a witness, the proper inquiry is as to his general reputation for veracity, where he is best known. *ib*
3. Where judgment is rendered for more than two witnesses' fees, it will be presumed that the certificate of the judge, that more than two were necessary, was regularly made. *McGuffie v. Dervine*, 251
4. Where, upon the cross-examination of a witness, it appeared that he was security for costs of the suit, but was still permitted to testify without objection, and after the evidence in the case was closed; the cause had been submitted on a motion; and after the court had adjourned for one night; it was moved to exclude his testimony, on the ground of interest; it was held that the objection came too late; that it should have been urged when the incompetency of the wit-

ness was disclosed by his evidence. *Austin v. Peasley*, 257

5. Where the fee bill omits to state that the witnesses therein mentioned had testified in the case, or were material, it will still be presumed that they were witnesses in the case, and entitled to fees. *Hemphill v. Salladay*, 301
6. Had the witness been objected to, and the objection overruled by the court, the proceeding should have been made matter of record by a bill of exceptions, in order to make it cause of error. *Ray v. State*, 316
7. An accomplice should not be admitted as a witness without a previous order from the court, made on an application, showing that there is no other person by whom the offence can be proved; that the witness is not more guilty than the person on trial; and that his testimony can be substantially corroborated. *ib*
8. Though a *particeps criminis* is not an incompetent witness, the court should instruct the jury not to convict of felony on his uncorroborated testimony. Such corroboration should be in facts tending to establish the guilt of the accused. *ib*
9. After a bill is dismissed as to one of the defendants, he appearing as one of the makers of the note for which the mortgage was given as security, and interested in defeating a recovery upon the mortgage, he should not be admitted as a witness in the case. *Wilkerson v. Daniels*, 180

See EVIDENCE.

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